

# Model Information Technology Contract for Software

The focus of this Contract is “off-the-shelf” Software, *not* Software specifically developed for WSDOT. Off-the-shelf Software may require Vendor-provided adaptation and/or specialized installation, but the core Software program is already developed and available commercially to other WSDOTs. For Software being developed especially for WSDOT, one of the Services contracts should be used.

Hybrids: WSDOTs will often be acquiring a combination of equipment, software and services. In those instances, WSDOT should start with the model contract that addresses the major purpose of the acquisition and then integrate additional provisions from the other pertinent models into WSDOT’s contract.

**Contract Number *[KXXX]***

**for**

***[describe acquisition]***

**between the**

**Washington State**

**Department of Transportation**

**and**

***[Vendor]***

**Effective Date:** \_\_\_\_\_

*[Add Effective Date]*

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## CONTRACT NUMBER *[KXXX]*

for

*[describe acquisition]*

### PARTIES *(required)*

**Parties – This section identifies the parties entering into the Contract. It states WSDOT's name and address and Vendor's legal name and address.**

This Contract ("Contract") is entered into by and between the state of Washington, acting by and through the Department of Transportation, an agency of Washington State government ("WSDOT") located at *[WSDOT address]*, and *[Vendor]*, a *[corporation/sole proprietor or other business form]* licensed to conduct business in the state of Washington ("Vendor"), located at *[Vendor address]* for the purpose of purchasing Software licenses for *[describe Software licenses to be purchased]*.

### RECITALS

**Recitals – This section provides the acquisition's history and demonstrates the presence of consideration, a requirement for every contract.**

*[Include the acquisition's history, whether the Contract resulted from an RFP, RFQ, RFQQ, sole source or other acquisition method.]*

The state of Washington, acting by and through *[WSDOT]*, issued a Request for *[Proposal/Quotation/Qualifications and Quotation] [RFX]* dated *[date]*, (Exhibit A) for the purpose of purchasing Software licenses for *[describe Software licenses to be purchased]* in accordance with its authority under 4319 RCW and chapter 39.26 RCW.

*[Vendor]* submitted a timely Response to the *[WSDOT]*'s *[RFX]* (Exhibit B).

The *[WSDOT]* evaluated all properly submitted Responses to the above-referenced *[RFX]* and has identified *[Vendor]* as the apparently successful Vendor.

The *[WSDOT]* has determined that entering into a Contract with *[Vendor]* will meet WSDOT's needs and will be in WSDOT's best interest.

*[If not a competitive acquisition, discuss sole source or other acquisition method in place of the above Recitals.]*

NOW THEREFORE, WSDOT awards to *[Vendor]* this Software License Contract, the terms and conditions of which shall govern Vendor's furnishing to *[WSDOT]* the *[describe the Software licenses being purchased]* and Services. This Contract is not for personal use.

IN CONSIDERATION of the mutual promises as hereinafter set forth, the parties agree as follows:

## 1. Definition of Terms

**Definition of Terms** – This section, near the beginning of the Contract, provides definitions for any potentially confusing, ambiguous, vague, or unique terms, as well as other terms that may be appropriate and useful in the Contract.

*[Add or delete items so that only those definitions that are pertinent to this Contract are included.]*

The following terms as used throughout this Contract shall have the meanings set forth below.

**“Acceptance”** shall mean that the Software has passed its Acceptance Testing and shall be formalized in a written notice from WSDOT to Vendor; or, if there is no Acceptance Testing, Acceptance shall occur when the Products are delivered.

**“Acceptance Date”** *[check RFX for which of these circumstances is appropriate]* shall mean the date upon which WSDOT Accepts the Software as provided in the section titled **Standard of Performance and Acceptance**; or, if there is no Acceptance Testing, Acceptance Date shall mean the date Vendor delivers the Products.

**“Acceptance Testing”** shall mean the process for ascertaining that the Software meets the standards set forth in the section titled **Standard of Performance and Acceptance**, prior to Acceptance by the WSDOT.

**“Business Days and Hours”** shall mean Monday through Friday, 8:00 a.m. to 5:00 p.m., Pacific Time, except for holidays observed by the state of Washington.

*[Be sure that the definition for Confidential Information here is consistent with the definition in the section titled **Protection of WSDOT’s Confidential Information**.]*

**“Confidential Information”** shall mean information that may be exempt from disclosure to the public or other unauthorized persons under either chapter 42.17 RCW or other state or federal statutes. Confidential Information includes, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card information, driver’s license numbers, medical data, law enforcement records, agency source code or object code, agency security data, or *[add other items as necessary or delete items not applicable]*.

**“Contract”** shall mean this document, all schedules and exhibits, and all amendments hereto.

**“Delivery Date”** shall mean the date by which the Products ordered hereunder must be delivered. *[If a specific date is set forth in this Contract, you may insert that date here by adding: “which shall be (fill in specific date).”]*

**“Department”** shall mean the same as WSDOT.

**“Effective Date”** shall mean the first date this Contract is in full force and effect. It may be a specific date agreed to by the parties; or, if not so specified, the date of the last signature of a party to this Contract.

**“Exhibit A”** shall mean the *[RFX]*.

**“Exhibit B”** shall mean *[Vendor]*’s Response.

**“Help Desk”** shall mean a service provided by Vendor for the support of Vendor’s Products. WSDOT shall report warranty or maintenance problems to Vendor’s Help Desk for initial

troubleshooting and possible resolution of the problems or for the initiation of repair or replacement services.

**“Installation Date”** shall mean the date by which all Software ordered hereunder shall be in place, in good working order *[and ready for Acceptance Testing]*. *[If a specific date is set forth in the Contract, you may insert that date here by adding: “The Installation Date shall be (fill in specific date).”]*

**“License”** shall mean the rights granted to WSDOT to use the Software that is the subject of this Contract.

**“Order”** or **“Order Document”** shall mean any official document and attachments thereto specifying the Software and/or Services to be licensed or purchased from Vendor under this Contract.

**“Price”** shall mean charges, costs, rates, and/or fees charged for the Products and Services under this Contract and shall be paid in United States dollars.

**“Product(s)”** shall mean any Vendor-supplied equipment, Software, and documentation.

**“Proprietary Information”** shall mean information owned by Vendor to which Vendor claims a protectable interest under law. Proprietary Information includes, but is not limited to, information protected by copyright, patent, trademark, or trade secret laws.

**“WSDOT”** shall mean the state of Washington, any division, section, office, unit or other entity of WSDOT or any of the officers or other officials lawfully representing WSDOT.

**“WSDOT *[Project or Business]* Manager”** shall mean the person designated by WSDOT who is assigned as the primary contact person whom Vendor’s Account Manager shall work with for the duration of this Contract and as further defined in the section titled **WSDOT *[Project or Business]* Manager**.

**“WSDOT Contract Administrator”** shall mean that person designated by WSDOT to administer this Contract on behalf of WSDOT.

**“WSDOT Contracting Officer”** shall mean *[name of WSDOT’s officer with signature authority]*, or the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of the WSDOT Contracting Officer acting within the limits of his/her authority.

**“RCW”** shall mean the Revised Code of Washington.

**“*[RFX]*”** shall mean the Request for *[Proposal/Quotation/Qualifications and Quotation]* used as a solicitation document to establish this Contract, including all its amendments and modifications, Exhibit A hereto.

**“Response”** shall mean Vendor’s Response to WSDOT’s *[RFX]* for *[describe acquisition]*, Exhibit B hereto.

**“Schedule A: Authorized Product and Price List”** shall mean the attachment to this Contract that identifies the authorized Software and Services and Prices available under this Contract.

**“Schedule B: Escrow Agreement”** shall mean the attachment to this Contract containing the Software Escrow Agreement entered into by WSDOT and Vendor.

**“Schedule C: MWBE Certification”** shall mean the attached certificate(s) indicating Vendor’s and/or one or more of Vendor’s Subcontractor’s status as a minority or women’s business enterprise.

**“Services”** shall mean those Services provided under this Contract and related to the Software License(s) being purchased that are appropriate to the scope of this Contract and includes such things as installation Services, maintenance, training, etc.

**“Software”** shall mean the object code version of computer programs licensed pursuant to this Contract. Software also means the source code version, where provided by Vendor. Embedded code, firmware, internal code, microcode, and any other term referring to software residing in the equipment that is necessary for the proper operation of the equipment is not included in this definition of Software. Software includes all prior, current, and future versions of the Software and all maintenance updates and error corrections.

**“Specifications”** shall mean the technical and other specifications set forth in the *[RFX]*, Exhibit A, any additional specifications set forth in Vendor’s Response, Exhibit B, and the specifications set forth in Vendor’s Product documentation, whether or not Vendor produces such documentation before or after this Contract’s Effective Date.

**“Standard of Performance”** shall mean the criteria that must be met before Software Acceptance, as set forth in the section titled **Standard of Performance and Acceptance**. The Standard of Performance also applies to all additional, replacement or substitute Software and Software that is modified by or with the written approval of Vendor after having been accepted.

**“Subcontractor”** shall mean one not in the employment of Vendor, who is performing all or part of the business activities under this Contract under a separate contract with Vendor. The term “Subcontractor” means Subcontractor(s) of any tier.

**“Vendor”** shall mean *[Vendor]*, its employees and agents. Vendor also includes any firm, provider, organization, individual, or other entity performing the business activities under this Contract. It shall also include any Subcontractor retained by Vendor as permitted under the terms of this Contract.

**“Vendor Account Manager”** shall mean a representative of Vendor who is assigned as the primary contact person whom the WSDOT *[Project or Business]* Manager shall work with for the duration of this Contract and as further defined in the section titled **Vendor Account Manager**.

**“Vendor Contracting Officer”** shall mean *[title of Vendor officer with signature authority]*, or the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of Vendor Contracting Officer acting within the limits of his/her authority.

**“Work Product”** shall mean data and products produced under this Contract including but not limited to, discoveries, formulae, ideas, improvements, inventions, methods, models, processes, techniques, findings, conclusions, recommendations, reports, designs, plans, diagrams, drawings, Software, databases, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions, to the extent provided by law.

## Contract Term

### 2. Term *(required)*

**Term – This section specifies the effective date, duration and extensions of the Contract for: (i) purchasing Software Licenses; and (ii) maintenance and support. The term of the Software License being purchased is addressed in Section 9, License Grant.**

*[If the term or any subsequent term crosses biennial or fiscal year lines, specify that any license purchased or service performed beyond the fiscal or biennial year's end is contingent upon receipt of funding.]*

#### 2.1. Term of Contract for Licensed Software Purchases

*[If this is a single purchase contract, use only the following subsection. Otherwise, use an initial term and subsequent terms (subsections (a) and (b) below) as applicable.]*

All purchase transactions executed pursuant to this Contract's authority shall be placed by *[date]* and Vendor shall have the Software delivered by the date specified in the **Delivery** section and installed by the date specified in the **Installation** section.

*[-OR-]*

- a) This Contract's initial Licensed Software purchase term shall be *[\_\_\_\_\_( )]* years *[or other appropriate time period]*, commencing upon the Effective Date.
- b) This Contract's Licensed Software purchase term may be extended by *[\_\_\_\_\_( )]* additional *[one (1)]* year *[or other appropriate time period]* term[s], provided that the extensions shall be at WSDOT's option and shall be effected by WSDOT giving written notice of its intent to extend this Contract to Vendor not less than *[thirty (30)]* calendar days *[or other appropriate time period]* prior to the then-current Contract term's expiration and Vendor accepting such extension prior to the then-current Contract term's expiration. No change in terms and conditions shall be permitted during these extensions unless specifically agreed to in writing.

*[-OR—replace subsection 2.1b) above with the following]*

- c) b) This Contract's Software purchase term shall be automatically extended for *[\_\_\_\_\_( )]* additional *[one (1)]* year *[or other appropriate time period]* term[s] unless WSDOT terminates by giving written notice of its decision not to extend to Vendor not less than *[thirty (30)]* calendar days *[or other appropriate time period]* prior to the then-current Contract term's expiration. No change in terms and conditions shall be permitted during these extensions unless specifically agreed to in writing.

#### 2.2. License Term—see Section 9, **License Grant**

#### 2.3. Term of Contract for Maintenance and Support

- a) This Contract's initial Software maintenance and support term shall be *[\_\_\_\_\_( )]* year(s) *[or other appropriate time period]*, commencing the day following expiration of Vendor's warranty for the Software.
- b) This Contract's Software maintenance and support term may be extended by *[\_\_\_\_\_( )]* additional *[one (1)]* year *[or other appropriate time period]* term[s]:

provided that the extensions shall be at WSDOT's option and shall be effected by WSDOT giving written notice of its intent to extend this Contract to Vendor not less than *[thirty (30)]* calendar days *[or other appropriate time period]* prior to the then-current Contract term's expiration and Vendor accepting such extension prior to the then-current Contract term's expiration. No change in terms and conditions shall be permitted during these extensions unless specifically agreed to in writing.

*[-OR- replace subsection 2.3b) above, with the following subsection.]*

- b) This Contract's Software maintenance and support term shall be automatically extended for *[\_\_\_\_\_( )]* additional *[one (1)]* year *[or other appropriate time period]* term[s] unless WSDOT terminates by giving written notice of its decision not to extend to Vendor not less than *[thirty (30)]* calendar days *[or other appropriate time period]* prior to the then-current Contract term's expiration. No change in terms and conditions shall be permitted during these extensions unless specifically agreed to in writing.

### 3. Survivorship *(required)*

**Survivorship – This section provides for certain contractual provisions to remain in full force and effect after the Contract's expiration.**

*[Review the Contract after drafting is complete to determine whether additional sections should be referenced in this section.]*

All license and purchase transactions executed pursuant to the authority of this Contract shall be bound by all of the terms, conditions, Prices and Price discounts set forth herein, notwithstanding the expiration of the initial term of this Contract or any extension thereof. Further, the terms, conditions and warranties contained in this Contract that by their sense and context are intended to survive the completion of the performance, cancellation or termination of this Contract shall so survive. In addition, the terms of the sections titled **Overpayments to Vendor; License Grant; Software Ownership; Software Code Escrow *[when used]*; Ownership/Rights in Data; Date Warranty; No Surreptitious Codes Warranty; Vendor Commitments, Warranties and Representations; Protection of WSDOT's Confidential Information; Section Headings, Incorporated Documents and Order of Precedence; Publicity; Review of Vendor's Records; Patent and Copyright Indemnification; Vendor's Proprietary Information; Disputes; and Limitation of Liability**, and shall survive the termination of this Contract.

## Pricing, Invoice and Payment

### 4. Pricing *(required)*

**Pricing – This section establishes the conditions for Price increases and reductions, and notices thereof.**

*[If WSDOT wants to establish a maximum dollar amount that can be spent under the Contract, use the following subsection; otherwise delete it.]*

- 4.1. The total amount expended under this Contract shall not exceed *[\_\_\_\_]* dollars *[\$\_\_\_\_]* *[specify maximum dollar amount]*.

- 4.2. Vendor agrees to provide the Products and Services at the Prices set forth *[below or in Schedule A]*. No other Prices shall be payable to Vendor for implementation of Vendor's Response.

*[Use subsection 4.3 only if maintenance is also being purchased.]*

- 4.3. Upon expiration of Vendor-provided warranty as set forth in the section titled **Software Warranty** and upon election by WSDOT to receive maintenance and support Services from Vendor, WSDOT shall pay maintenance and support fees to Vendor *[calculated at [ ] percent ( % ) of Vendor's then-current license fee for the Software Product –OR– at the Prices set forth below or in Schedule A –OR– other reasonable amount/method of calculation]*.

- 4.4. Prices not be increased during the initial term of the Contract.

- 4.5. If Vendor reduces its Prices for any of the Software or Services during the term of this Contract, WSDOT shall have the immediate benefit of such lower Prices for new purchases. Vendor shall send notice to the WSDOT Contract Administrator with the reduced Prices within fifteen (15) Business Days *[or other appropriate time period]* of the reduction taking effect. – OR – Vendor shall send updated Prices to the WSDOT *[quarterly/semi-annually]*.

*[When including subsection 4.6, WSDOT may want to consider capping potential price increases, such as linking them to the Consumer Price Index, or not to exceed some percentage of the current prices, etc. Price caps should be included in the RFX.]*

- 4.6. At least *[one hundred twenty (120)]* calendar days *[or other appropriate time period]* before the end of the then-current term of this Contract, Vendor may propose license fees and Service rate increases by written notice to WSDOT Contract Administrator. Price adjustments will be taken into consideration by WSDOT Contract Administrator when determining whether to extend this Contract.

**Price Protection – This subsection is used to guarantee that WSDOT receives Vendor's most favored customer prices.**

*[Include the following subsection when federal funds are involved or in other special circumstances.]*

- 4.7. Vendor agrees all the Prices, terms, warranties, and benefits provided in this Contract are comparable to or better than the terms presently being offered by Vendor to any other governmental entity purchasing the same quantity under similar terms. If during the term of this Contract Vendor shall enter into contracts with any other governmental entity providing greater benefits or more favorable terms than those provided by this Contract, Vendor shall be obligated to provide the same to WSDOT for subsequent purchases.

*[Expenses are optional and must be appropriate to the Contract. Use the following subsection only if expenses are allowed.]*

- 4.8. WSDOT shall reimburse Vendor for travel and other expenses as identified in this Contract, or as authorized in writing, in advance by WSDOT in accordance with the then-current rules and regulations set forth in the *Washington State Administrative and Accounting Manual* (<http://www.ofm.wa.gov/policy/poltoc.htm>). Vendor shall provide a detailed itemization of expenses, including description, amounts and dates, and receipts for amounts of fifty dollars (\$50) or more when requesting reimbursement. *[If a maximum amount has been stated in*

*subsection 4.1 above, add the following: “The amount reimbursed to Vendor is included in calculating the total amount spend under this Contract.”]*

## 5. Advance Payment Prohibited *(required)*

**Advance Payments Prohibited – This section specifies that all payments must be made after the delivery of products or services. Agencies cannot issue payment prior to the performance of work, per the Washington State Constitution, Article VIII, Section 5, “Credit Not to be Loaned.”**

No advance payment shall be made for the Software and Services furnished by Vendor pursuant to this Contract. *[If Software maintenance and support Services are being paid for as a yearly program, ensure that the price and program are sufficiently described in the Contract and pricing schedule to ensure payment is not a violation of the advance payment prohibition. If there is Equipment maintenance, but it is not being paid in arrears as set forth in Invoice and Payment section below, insert the following: “Notwithstanding the above, maintenance payments, if any, may be made on a quarterly basis at the beginning of each quarter.” See also subsection 7.5 for consistency.]*

## 6. Taxes

**Taxes – This section identifies tax liability, responsibilities and exemptions for the Contract.**

- 6.1. WSDOT will pay sales and use taxes, if any, imposed on the Products and Services acquired hereunder. Vendor must pay all other taxes including, but not limited to, Washington Business and Occupation Tax, other taxes based on Vendor’s income or gross receipts, or personal property taxes levied or assessed on Vendor’s personal property. WSDOT, as an agency of Washington State government, is exempt from property tax.
- 6.2. Vendor shall complete registration with the Washington State Department of Revenue and be responsible for payment of all taxes due on payments made under this Contract.

## 7. Invoice and Payment *(required)*

**Invoice and Payment – This section specifies invoicing instructions. For example, WSDOT may require use of State Form A-19, Invoice Voucher, for submittal of requests for payment, or WSDOT may designate how often invoices may be submitted.**

*[No matter what form is required for invoice submittal, ensure that the invoice contains sufficient detail and back up documentation to determine the appropriateness of the charges.]*

- 7.1. Vendor will submit properly itemized invoices to *[title of person to receive invoices]* at *[provide appropriate address]*. Invoices shall provide and itemize, as applicable:
  - a) WSDOT Contract number *[XXX-XXX-XXX]*;
  - b) Vendor name, address, phone number, and Federal Tax Identification Number;
  - c) Description of Software, including quantity ordered;
  - d) Date(s) of delivery and/or date(s) of installation and set up;
  - e) Price for each item, or Vendor’s list Price for each item and applicable discounts;

- f) Maintenance charges;
- g) Net invoice Price for each item;
- h) Applicable taxes;
- i) Shipping costs;
- j) Other applicable charges;
- k) Total invoice Price; and
- l) Payment terms including any available prompt payment discounts.

*[Include the following subsection only when expenses are allowed.]*

- 7.2. If expenses are invoiced, Vendor must provide a detailed itemization of those expenses that are reimburseable, including description, amounts and dates. Any single expense in the amount of fifty dollars (\$50) or more must be accompanied by a receipt in order to receive reimbursement. (see subsection 4.8 above)
- 7.3. Payments shall be due and payable within thirty (30) calendar days after receipt and Acceptance of Software or Services or thirty (30) calendar days after receipt of properly prepared invoices, whichever is later.

*[Include the following subsection only when Vendor indicated minority or women's business enterprise participation in its Response and Schedule C – MWBE Certification is attached.]*

- 7.4. With each invoice Vendor shall provide an *Affidavit of Amounts Paid* specifying the amounts paid to each certified MWBE under the Contract, as set forth in Section 30 below.

*[Include the following subsection when maintenance and support are part of the contract.]*

- 7.5. WSDOT shall pay maintenance and support charges on a monthly basis, in arrears.  
*[Change preceding sentence if payment is one quarter in advance, as authorized in RCW 43.88.160(5)(e). If paying for a yearly program of Software maintenance and support, ensure that the Price and program are sufficiently described in the Contract and Pricing schedule to ensure payment is not a violation of the advance payment prohibition.]* Payment of maintenance service/support of less than one (1) month's duration shall be prorated at 1/30<sup>th</sup> of the basic monthly maintenance charges for each calendar day.
- 7.6. Incorrect or incomplete invoices will be returned by WSDOT to Vendor for correction and reissue.
- 7.7. The WSDOT Contract number *[XXX-XXX-XXX]* must appear on all bills of lading, packages, and correspondence relating to this Contract.
- 7.8. WSDOT shall not honor drafts, nor accept goods on a sight draft basis.
- 7.9. If WSDOT fails to make timely payment, Vendor may invoice WSDOT one percent (1%) per month on the amount overdue or a minimum of one dollar (\$1). Payment will not be considered late if payment is deposited electronically in Vendor's bank account or if a check or warrant is postmarked within thirty (30) calendar days of Acceptance of the Software or receipt of Vendor's properly prepared invoice, whichever is later.

## 8. Overpayments to Vendor

Vendor shall refund to WSDOT the full amount of any erroneous payment or overpayment under this Contract within thirty (30) days' written notice. If Vendor fails to make timely refund, WSDOT may charge Vendor one percent (1%) per month on the amount due, until paid in full.

## Software License

### 9. License Grant *(required)*

**License Grant** – This section is a very important element in the Contract. It documents the license's scope and magnitude and reflects the parties' mutual understanding regarding what is being licensed.

**Business or Support Termination Rights** – This section gives WSDOT a perpetual license in event of business termination, regardless of license term.

**Freedom of Use** – This section ensures that users of a computer service center have the right to use the center's Software without interference or having to obtain additional licenses.

- 9.1. Vendor grants to WSDOT a non-exclusive, perpetual *[site-wide, irrevocable, transferable – use terms as applicable]* license to use the Software and related documentation according to the terms and conditions of this Contract.

*[Include the following subsection if the Contract includes the right to modify the Software.]*

- 9.2. WSDOT may modify any Vendor Software and may combine such with other programs or materials to form a derivative work, provided that upon discontinuance or termination of the license, Vendor Software will be removed from the derivative work and, at WSDOT's option, either destroyed or returned to Vendor. In such situations, WSDOT retains a license only to use the Software in the derivative work.
- 9.3. WSDOT will not decompile or disassemble any Software provided under this Contract or modify Software that bears a copyright notice of any third party without the prior written consent of Vendor or Software owner.
- 9.4. WSDOT may copy each item of Software to a single hard drive *[or multiple hard drives or network, whichever is applicable]*.
- 9.5. WSDOT will make and maintain no more than one *[or other agreed upon number]* archival copy of each item of Software, and each copy will contain all legends and notices and will be subject to the same conditions and restrictions as the original. WSDOT may also make copies of the Software in the course of routine backups of hard drive(s) for the purpose of recovery of hard drive contents. WSDOT may use backup or archival copies of the Software, without reinstallation or interruption of production copy(ies), for disaster recovery exercises at its disaster recovery site(s), without additional charge. WSDOT may make these backup or archival copies available to the disaster recovery site(s)' employees who require use of the Software in order to assist WSDOT with disaster recovery exercises. WSDOT agrees that production use of the Software at the disaster recovery site(s) shall be limited to times when WSDOT's facilities, or any portion thereof, are inoperable due to emergency situations.

*[Include the following subsection if the Contract is not for a perpetual license. WSDOT should negotiate with Vendor to obtain a set price for the conversion to perpetual licenses rather than agree to pay the then-current rates.]*

- 9.6. Business or Support Termination Rights. In the event that Vendor shall, for any reason, cease to conduct business, or cease to support the Software licensed under this Contract, WSDOT shall have a right to convert the Software licenses into perpetual licenses, with rights of quiet enjoyment, but subject to payment obligations not to exceed the Contract Prices.
- 9.7. Freedom of Use. Vendor understands that WSDOT may provide information processing services to other users that are agencies of state government and other tax-supported entities. Vendor further understands that WSDOT or other users that are agencies of state government and other tax-supported entities may provide services to the public through Internet applications. Software delivered hereunder may be used in the delivery of these services. Vendor acknowledges and agrees that such use of Software products is acceptable under the licensing agreements contained herein.

*[Include the following subsection only if the Software is associated with a specific machine or other piece of equipment.]*

- 9.8. WSDOT may move Software from one device to another provided such Software is completely removed from the first device after a reasonable testing period on the new device.

## 10. Software Ownership *(required)*

**Software Ownership – This section warrants that Vendor is the owner of the Software and/or has unrestricted rights to license it to WSDOT.**

*[Use the following subsection when WSDOT is acquiring license but not ownership.]*

Vendor shall maintain all title, copyright, and other proprietary rights in the Software. WSDOT does not acquire any rights, express or implied, in the Software, other than those specified in this Contract. Vendor hereby warrants and represents to WSDOT that Vendor is the owner of the Software licensed hereunder or otherwise has the right to grant to WSDOT the licensed rights to the Software provided by Vendor through this Contract without violating any rights of any third party worldwide. Vendor represents and warrants that Vendor has the right to license the Software to WSDOT as provided in this Contract and that WSDOT's use of the Software and documentation within the terms of this Contract will not infringe upon any copyright, patent, trademark, or other intellectual property right worldwide or violate any third party's trade secret, contract, or confidentiality rights worldwide. Vendor represents and warrants that: (i) Vendor is not aware of any claim, investigation, litigation, action, suit or administrative or judicial proceeding pending or threatened based on claims that the Software infringes any patents, copyrights, or trade secrets of any third party, and (ii) that Vendor has no actual knowledge that the Software infringes upon any patents, copyrights, or trade secrets of any third party.

## 11. Software Code Escrow

**Software Code Escrow – This section will rarely be useful. It protects users’ right to continuity of use and access to source code for Software. This section is meant to provide protection for mission critical Software, not routine coverage for all Software. If this section is used, it should be accompanied by an attached escrow agreement with Vendor, WSDOT, and third party signatures (Schedule B). This section may also be used to provide WSDOT with source code to Software when Vendor warranty or Vendor maintenance expires.**

*[Use this section when WSDOT is acquiring license but not ownership AND when there is a valid concern that WSDOT’s business operations would not be able to continue were the Software product no longer supported, marketed, or allowed to be used.]*

- 11.1. Source Code Escrow Package Definition. The term “Source Code Escrow Package” shall mean:
  - a) A complete copy in machine-readable form of the source code and executable code of the licensed Software;
  - b) A complete copy of any existing design documentation and user documentation; and/or
  - c) Complete instructions for compiling and linking every part of the source code into executable code for purposes of enabling verification of the completeness of the source code as provided below. Such instructions shall include precise identification of all compilers, library packages, and linkers used to generate executable code.
- 11.2. Delivery of Source Code into Escrow. Vendor shall deliver a Source Code Escrow Package to Escrow Agent, provided that Vendor, WSDOT, and Escrow Agent shall first enter into a supplementary escrow agreement attached as Schedule B – *Escrow Agreement*. Vendor and WSDOT shall use best efforts to enter into such an Escrow Agreement as soon as possible after the Effective Date of this Contract, but not later than *[thirty (30) days or other appropriate time period]* after the Effective Date of this Contract.
- 11.3. Delivery of New Source Code into Escrow. If during the term of this Contract, term of license, or term of maintenance and support, Vendor provides WSDOT with a maintenance release or upgrade version of the licensed Software, Vendor shall within ten (10) Business Days deposit with Escrow Agent a Source Code Escrow Package for the maintenance release or upgrade version and give WSDOT notice of such delivery.
- 11.4. Verification of Source Code Escrow Package. At its option and expense, WSDOT may request that the completeness and accuracy of any Source Code Escrow Package be verified.
  - a) Such verification may be requested once per Source Code Escrow Package.
  - b) Such verification will be conducted by Escrow Agent or, upon at least ten (10) Business Days’ prior notice to Vendor, by another party (“Verifier”) acceptable to Vendor, after full disclosure to Vendor of information reasonably requested by Vendor about Verifier.
  - c) Prior to conducting the verification, Verifier shall first execute a confidentiality agreement prepared by Vendor that precludes Verifier from disclosing any information to WSDOT about the Source Code Escrow Package other than whether the Source Code Escrow Package was found to be complete and accurate.

- d) Unless otherwise agreed at the time by Vendor and WSDOT, verification will be performed on-site at Vendor's premises, utilizing Vendor's equipment and software, at a time reasonably acceptable to Vendor. Vendor shall make technical and support personnel available as reasonably necessary for the verification.
  - e) At its discretion, Vendor may designate a representative to accompany the Source Code Escrow Package at all times, and to be present at the verification. Verifier will be WSDOT's sole representative at the verification.
  - f) Verifier is solely responsible for the completeness and accuracy of the verification. Neither the Escrow Agent, if different from the Verifier, nor Vendor shall have any responsibility or liability to WSDOT for any incompleteness or inaccuracy of any verification.
- 11.5. Escrow Fees. All fees and expenses charged by Escrow Agent will be borne by Vendor.
- 11.6. Release Events for Source Code Escrow Packages. The Source Code Escrow Package may be released from escrow to WSDOT, temporarily or permanently, solely upon the occurrence of one or more of the following "Escrow Release Events:"
- a) Vendor becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition of bankruptcy, suffers or permits the appointment of a receiver for business or assets, or becomes subject to any proceeding under any bankruptcy or involency law, whether domestic or foreign;
  - b) Vendor has wound up or liquidated its business voluntarily or otherwise and WSDOT has compelling reasons to believe that such events will cause Vendor to fail to meet its warranties and maintenance obligations in the foreseeable future; or
  - c) Vendor has voluntarily or otherwise discontinued support of the Software or fails to support the Software in accordance with its warranties and maintenance obligations.
- 11.7. Release Event Procedures. If WSDOT desires to obtain the Source Code Escrow Package from Escrow Agent:
- a) WSDOT shall comply with the procedures set forth in the Escrow Agreement to document the occurrence of the Release Event;
  - b) WSDOT shall maintain all materials and information comprising the Source Code Escrow Package in confidence in accordance with the Contract section titled Vendor's Proprietary Information;
  - c) If the release is temporary, WSDOT shall promptly return all released materials to Vendor when the circumstances leading to the release are no longer in effect; and
  - d) WSDOT shall promptly, fully, and completely respond to any and all requests for information from Vendor concerning WSDOT's use or contemplated use of the Source Code Escrow Package.

## 12. Ownership/Rights in Data *(required)*

**Ownership/Rights in Data – These sections ensure that data and work product originating from the Contract shall be “works for hire” as defined by the U.S. Copyright Act of 1976 and shall be owned by WSDOT.**

*[Include the following subsections when WSDOT is acquiring ownership of Software or Work Product.]*

- 12.1. WSDOT and Vendor agree that all data and work products (collectively called “Work Product”) produced pursuant to this Contract shall be considered work made for hire under the U.S. Copyright Act, 17 U.S.C. §101 *et seq.*, and shall be owned by WSDOT. Vendor is hereby commissioned to create the Work Product. Work Product includes, but is not limited to, discoveries, formulae, ideas, improvements, inventions, methods, models, processes, techniques, findings, conclusions, recommendations, reports, designs, plans, diagrams, drawings, Software, databases, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions, to the extent provided by law. Ownership includes the right to copyright, patent, register and the ability to transfer these rights and all information used to formulate such Work Product.
- 12.2. If for any reason the Work Product would not be considered a work made for hire under applicable law, Vendor assigns and transfers to WSDOT the entire right, title and interest in and to all rights in the Work Product and any registrations and copyright applications relating thereto and any renewals and extensions thereof.
- 12.3. Vendor shall execute all documents and perform such other proper acts as WSDOT may deem necessary to secure for WSDOT the rights pursuant to this section.
- 12.4. Vendor shall not use or in any manner disseminate any Work Product to any third party, or represent in any way Vendor ownership in any Work Product, without the prior written permission of WSDOT. Vendor shall take all reasonable steps necessary to ensure that its agents, employees, or Subcontractors shall not copy or disclose, transmit or perform any Work Product or any portion thereof, in any form, to any third party.
- 12.5. Material that is delivered under this Contract, but that does not originate therefrom (“Preexisting Material”), shall be transferred to WSDOT with a nonexclusive, royalty-free, irrevocable license to publish, translate, reproduce, deliver, perform, display, and dispose of such Preexisting Material, and to authorize others to do so except that such license shall be limited to the extent to which Vendor has a right to grant such a license. Vendor shall exert all reasonable effort to advise WSDOT at the time of delivery of Preexisting Material furnished under this Contract, of all known or potential infringements of publicity, privacy or of intellectual property contained therein and of any portion of such document which was not produced in the performance of this Contract. Vendor agrees to obtain, at its own expense, express written consent of the copyright holder for the inclusion of Preexisting Material. WSDOT shall receive prompt written notice of each notice or claim of copyright infringement or infringement of other intellectual property right worldwide received by Vendor with respect to any Preexisting Material delivered under this Contract. WSDOT shall have the right to modify or remove any restrictive markings placed upon the Preexisting Material by Vendor.

### 13. Software Specifications

All Software will conform to its Specifications. Vendor warrants that the Products delivered hereunder shall perform in conformance with the Specifications.

### 14. Compliance with Standards

**Compliance with Standards – This section requires Vendor to comply with specified Software standards (WSDOT’s, American National Standards Institute (ANSI), International Standards Organization (ISO), or other standards.**

14.1. Vendor represents that all Software and elements thereof, including but not limited to, documentation and source code, shall meet and be maintained by Vendor to conform to *[(the standards set forth in the RFX, Response, or Schedule \_\_) – OR – (applicable industry standards)]*.

*[Use of one of the following subsections is optional. Do not use both. They require Vendor to meet minimum standards for quality assurance. In many cases, neither will be used since many companies have not attained either type of certification; however, consider these clauses in cases where quality and reliability are exceptionally important.]*

14.2. Vendor warrants that it has received certification from an authorized certifying authority that its Software quality assurance practices conform to the requirements of the current version of the International Standards Organization (ISO) ISO-9001 standard “Quality systems - Model for quality assurance in design, development, production, installation and servicing” and that this certification was received within one (1) year of execution of this Contract. Vendor further warrants that it will maintain its quality assurance practices and certification in conformance with the ISO-9001 during the term of this Contract.

*[-OR– substitute the paragraph below for subsection 14.2]*

Vendor warrants that its Software development process has been assessed by a certified Software Capability Evaluator, as defined by the Software Engineering Institute, and found to conform to the requirements of a Level 2 development process as defined by the current version of the Capability Maturity Model (CMM), also defined by the Software Engineering Institute. Vendor further warrants that it will maintain or improve its Software development process at Level 2 or above during the term of this Contract.

### 15. Date Warranty *(required)*

Vendor warrants that all Software provided under this Contract: (i) does not have a life expectancy limited by date or time format; (ii) will correctly record, store, process, and present calendar dates; (iii) will lose no functionality, data integrity, or performance with respect to any date; and (iv) will be interoperable with other software used by WSDOT that may deliver date records from the Software, or interact with date records of the Software (“Date Warranty”). In the event a Date Warranty problem is reported to Vendor by WSDOT and such problem remains unresolved after three (3) calendar days, at WSDOT’s discretion, Vendor shall send, at Vendor’s sole expense, at least one (1) qualified and knowledgeable representative to WSDOT’s premises. This representative will continue to address and work to remedy the failure, malfunction, defect, or nonconformity on WSDOT’s premises. This Date Warranty shall last perpetually. In the event of a breach of any of these representations and warranties, Vendor shall indemnify and hold

harmless WSDOT from and against any and all harm, injury, damages, costs, and expenses incurred by WSDOT arising out of said breach.

## 16. Physical Media Warranty

- 16.1. Vendor warrants to WSDOT that each licensed copy of the Software provided by Vendor is and will be free from physical defects in the media that tangibly embodies the copy (the “Physical Media Warranty”). The Physical Media Warranty does not apply to defects discovered more than thirty (30) calendar days after the date of Acceptance of the Software copy by WSDOT.
- 16.2. Vendor shall replace, at Vendor’s expense including shipping and handling costs, any Software copy provided by Vendor that does not comply with this warranty.

## 17. No Surreptitious Code Warranty *(required)*

- 17.1. Vendor warrants to WSDOT that no licensed copy of the Software provided to WSDOT contains or will contain any Self-Help Code nor any Unauthorized Code as defined below. Vendor further warrants that Vendor will not introduce, via modem or otherwise, any code or mechanism that electronically notifies Vendor of any fact or event, or any key, node, lock, time-out, or other function, implemented by any type of means or under any circumstances, that may restrict WSDOT’s use of or access to any program, data, or equipment based on any type of limiting criteria, including frequency or duration of use for any copy of the Software provided to WSDOT under this Contract. The warranty is referred to in this Contract as the “No Surreptitious Code Warranty.”
- 17.2. As used in this Contract, “Self-Help Code” means any back door, time bomb, drop dead device, or other software routine designed to disable a computer program automatically with the passage of time or under the positive control of a person other than a licensee of the Software. Self-Help Code does not include software routines in a computer program, if any, designed to permit an owner of the computer program (or other person acting by authority of the owner) to obtain access to a licensee’s computer system(s) (e.g., remote access via modem) solely for purposes of maintenance or technical support.
- 17.3. As used in this Contract, “Unauthorized Code” means any virus, Trojan horse, worm or other software routines or equipment components designed to permit unauthorized access, to disable, erase, or otherwise harm Software, equipment, or data; or to perform any other such actions. The term Unauthorized Code does not include Self-Help Code.
- 17.4. Vendor will defend WSDOT against any claim, and indemnify WSDOT against any loss or expense arising out of any breach of the No Surreptitious Code Warranty. No limitation of liability, whether contractual or statutory, shall apply to a breach of this warranty.

## 18. Reauthorization Code Required

If a reauthorization code must be keyed in by Vendor for the Software to remain functional upon movement to another computer system, Vendor shall provide the reauthorization code to WSDOT within one (1) Business Day after receipt of WSDOT’s notice of its machine upgrade or movement.

*[- OR -]*

If a reauthorization code must be keyed in by Vendor for the Software to remain functional upon movement to another computer system, Vendor shall provide the reauthorization code to WSDOT: (i) in connection with a machine upgrade or other movement for which WSDOT pays Vendor a machine upgrade fee as set forth in Schedule A, immediately upon receipt of such fee; or (ii) if WSDOT need not pay a fee or other charge in connection with the machine upgrade or other movement, within one (1) Business Day after receipt of WSDOT's notice of its machine upgrade or movement.

*[If WSDOT is acquiring a site license, unlimited CPU license, or other similar license, use the following:]*

Vendor's Software shall not require a reauthorization code in order for the Software to remain functional upon WSDOT's movement of the Software to another computer system.

## 19. Software Documentation

*[WSDOT's business needs determine whether the manuals must be provided at no additional cost or at a specified cost.]*

Vendor will provide two (2) complete sets of documentation for each Software order, including technical, maintenance, and installation information. Vendor shall also provide two (2) complete sets of documentation for each updated version of Software that Vendor provides pursuant to the **Software Upgrades and Enhancements** section. Vendor shall provide the documentation on or before the date Vendor delivers its respective Software. There shall be no additional charge for this documentation or the updates, in whatever form provided. Vendor's Software documentation shall be comprehensive, well structured, and indexed for easy reference. If Vendor maintains its technical, maintenance and installation documentation on a web site, Vendor may fulfill the obligations set forth in this section by providing WSDOT access to its web-based documentation information. Vendor may also provide such information on CD-ROM. Vendor grants WSDOT the right to make derivative works, update, modify, copy, or otherwise reproduce the documentation furnished pursuant to this section at no additional charge.

## Vendor's Responsibilities

**Vendor's Responsibilities – Sections in this category set out Vendor's responsibilities. All work expectations, tasks, goals, deliverables, and milestones of the Software and Services to be provided must be clearly defined. Do not take any work for granted or plan to handle some expectations by verbal agreement. If the Service, deliverable, standard, or other expectation is not included in the Contract, its performance may not be required.**

**If Vendor's duties and responsibilities have been satisfactorily delineated in Exhibit A (RFX) and Exhibit B (Vendor's Response), then the specific Contract section may just reference the applicable provisions. Be sure that Exhibits A and B are incorporated by reference (see section 35 below).**

## 20. Shipping and Risk of Loss

**Shipping and Risk of Loss** – This section establishes responsibility for cost and the method of transportation and allocates risk of loss during shipment to WSDOT. If there is no physical medium for Vendor's Software and documentation, i.e., Products will be downloaded or accessed directly from the Internet, then this section should be deleted.

Vendor shall ship all Products purchased pursuant to this Contract, freight prepaid, FOB WSDOT's destination. The method of shipment shall be consistent with the nature of the Products and hazards of transportation. Regardless of FOB point, Vendor agrees to bear all risks of loss, damage, or destruction of the Products ordered hereunder that occurs prior to *[Delivery Date or Acceptance, whichever is applicable]*, except loss or damage attributable to WSDOT's fault or negligence; and such loss, damage, or destruction shall not release Vendor from any obligation hereunder. After *[Delivery Date or Acceptance, whichever is applicable]*, the risk of loss or damage shall be borne by WSDOT, except loss or damage attributable to Vendor's fault or negligence.

## 21. Delivery

**Delivery** – This section establishes the terms, dates, and conditions for delivery. With the growing use of the Internet to provide Products, WSDOT may need to address the delivery of *intangible* as well as *tangible* Products. An example is provided in subsection 21.4.

- 21.1. Vendor shall deliver the Products ordered pursuant to this Contract on or before *[specify delivery date]*, the Delivery Date. For any exception to this Delivery Date, Vendor must notify WSDOT and obtain prior approval in writing. Time is of the essence with respect to delivery and Vendor may be subject to liquidated damages and/or termination of an order or of this Contract and/or other damages available under law for failure to deliver on time.
- 21.2. All deliveries made pursuant to this Contract must be complete. Unless Vendor has obtained prior written approval from WSDOT, which shall not be withheld unreasonably, incomplete deliveries or backorders will not be accepted. All packages must be accompanied by a packing slip that identifies all items included with the shipment and the WSDOT's Order Document number. Vendor's delivery receipt must be signed by an authorized representative of WSDOT for all deliveries made hereunder.
- 21.3. *[Provide any other delivery instructions, e.g., truck not more than 28 feet in length, or no deliveries after 3:00 p.m., must prearrange deliveries with specified person, etc.]*

*[-OR-]*

*[For Products that will be downloaded or accessed directly through the Internet, one or more subsections describing how Vendor's Software or documentation will be delivered should be added. One area to be addressed is how WSDOT will access Vendor's site, e.g., will Vendor provide a specialized site for WSDOT on Vendor's commercial site that WSDOT can access with a unique personal identification number or digital certificate, etc.]*

*[Here is a sample Internet Software delivery subsection:]*

- 21.4. Vendor shall maintain a web site from which WSDOT may download the Software *[specify method of access for WSDOT, security, etc.]*. Such web site shall be of a design approved

by both Vendor and WSDOT prior to this Contract's execution. Vendor shall not change such web site without the prior written consent of WSDOT. Time is of the essence with respect to delivery and Vendor may be subject to termination of this Contract and/or other damages available under law for failure to maintain an operable web site.

## 22. Site Security

*[This section should be used if Vendor will be performing any Services on WSDOT's site.]*

While on WSDOT's premises, Vendor, its agents, employees, or Subcontractors shall conform in all respects with physical, fire, or other security regulations.

## 23. Installation

*[Use the following section if Vendor will install the Software.]*

Vendor shall install the Software on WSDOT's designated equipment in accordance with the *[applicable industry standards—OR—installation requirements in RFX —OR— the requirements set forth in in this section]*.

*[Use the following section if WSDOT will install the Software.]*

All installation of the Software purchased pursuant to this Contract for use by WSDOT will be by and at the sole expense of WSDOT.

## 24. Standard of Performance and Acceptance

**Standard of Performance and Acceptance – This section establishes the standard of performance that must be met before WSDOT accepts any Product.**

**Acceptance testing is not always needed. When deciding whether to require acceptance testing, WSDOT can consider such things as: (1) whether the Software to be purchased performs a critical business function; (2) how well established and reliable is the technology being procured; (3) whether the Software is being customized for WSDOT; (4) how complex is the Software's installation; and (5) whether the Software is installed in conjunction with other WSDOT equipment or software.**

**Commodity-like Software performance issues are usually covered by replacing the Software while it is under warranty (see section 25, Software Warranty) or through fixes and updates provided under maintenance and support services (see section 27, Software Maintenance and Support Services). Therefore, Software is considered Accepted upon delivery.**

**If the Software will perform a critical business function or when leading edge technology is being acquired, WSDOT may decide to establish performance criteria and use this section.**

- 24.1. This section establishes a Standard of Performance that must be met before Acceptance. This Standard of Performance is also applicable to any additional, replacement, or substitute Software and any Software that is modified by or with the written approval of Vendor after having been Accepted.

- 24.2. The Standard of Performance for Software is defined as *[reference the RFX or a Schedule or fill in the Specifications or performance criteria that will be used to evaluate the Software]*.
- 24.3. The Acceptance Testing period shall be *[thirty (30) calendar days or other appropriate time period]* starting from the day after the Software is installed and Vendor certifies that Software is ready for Acceptance Testing. WSDOT will review all pertinent data and shall maintain appropriate daily records to ascertain whether the Standard of Performance has been met.
- 24.4. In the event the Software does not meet the Standard of Performance during the initial period of Acceptance Testing, WSDOT may, at its discretion, continue Acceptance Testing on a day-to-day basis until the Standard of Performance is met. If after *[ninety (90) calendar days, or other appropriate time period]* the Software still has not met the Standard of Performance WSDOT may, at its option: (i) declare Vendor to be in breach of this Contract and terminate this Order or this Contract; or, (ii) at the sole option of WSDOT, demand replacement Software from Vendor at no additional cost to WSDOT; or, (iii) continue the Acceptance Testing for an additional *[thirty (30) calendar days, or other appropriate time period]*. WSDOT's option to declare Vendor in breach and terminate this Order or this Contract shall remain in effect until exercised or until such time as Acceptance Testing is successfully completed.
- 24.5. Software shall not be accepted and no charges shall be paid until this Standard of Performance is met. The date of Acceptance shall be the first WSDOT Business Day following the successful Acceptance Testing period and shall be formalized in a notice of Acceptance from WSDOT to Vendor.

## 25. Software Warranty

**Software Warranty – This section specifies what Vendor will do to remedy Software problems during the Warranty Period.**

**Software warranties can vary considerably and WSDOT's specific needs should be considered and expressed in the RFX. A warranty is essentially a promise from Vendor that its products are of the quality and will perform as represented. The warranty is backed up by Vendor's offer to repair or replace any of its products that fail to so perform. The time period for warranties is generally 90 days, depending on the product. Vendors sometimes offer an "extended" warranty option. For example, Vendor's standard warranty is for 90 days, but WSDOT can purchase an extended warranty for one or two years for a correspondingly higher purchase price. Warranties are included in the purchase price.**

**Warranty and maintenance provisions are sometimes confused because they can appear similar. The most important distinction is that *warranty* costs are included in the purchase price whereas *maintenance* costs are paid on a periodic basis. The maintenance term and costs do not begin until the day after the Warranty Period ends.**

Vendor warrants that the Software shall be in good operating condition and shall conform to the Specifications for a period of *[ninety (90) days, or other time period as specified by WSDOT in the RFX or in Vendor's Response]*, the Warranty Period. This Warranty Period begins the first day after the Acceptance Date. Vendor shall replace all Software that is defective or not performing in accordance with the Specifications, at Vendor's sole expense.

## 26. Software Upgrades and Enhancements

**Software Upgrades and Enhancement – This section establishes conditions for upgrade, downgrade, trade-ins, etc., for exchange of Software.**

*[Add to or delete from the following list, if purchasing this coverage; otherwise delete entire section.]*

Vendor shall:

- 26.1. Supply at no additional cost updated versions of the Software to operate on upgraded versions of operating systems, upgraded versions of firmware, or upgraded versions of hardware;
- 26.2. Supply at no additional cost updated versions of the Software that encompass improvements, extensions, maintenance updates, error corrections, or other changes that are logical improvements or extensions of the original Software supplied to WSDOT; and
- 26.3. Supply at no additional cost interface modules that are developed by Vendor for interfacing the Software to other Software products.

## 27. Software Maintenance and Support Services

**Software Maintenance and Support – This section establishes Vendor's responsibilities to correct problems, provide updates and support of the Software.**

*[Negotiate this section with Vendor. Support services often come with the acquisition of a separately stated maintenance package. Some Vendors provide standard maintenance programs that will meet WSDOT's needs while others will not. Ensure that requirements and penalties are consistent with WSDOT's business needs and with the specific Software.]*

Vendor shall provide a replacement copy or correction service at no additional cost to WSDOT for any error, malfunction, or defect in Software that, when used as delivered, fails to perform in accordance with the Specifications and that WSDOT shall bring to Vendor's attention. Vendor shall undertake such correction service as set forth below and shall use its best efforts to make corrections in a manner that is mutually beneficial. Vendor shall disclose all known defects and their detours or workarounds to WSDOT.

In addition, Vendor shall provide the following Services:

- 27.1. Help Desk Services. Vendor shall provide Help Desk Services for reporting errors and malfunctions and trouble shooting problems. Vendor's Help Desk Services shall be *[web-based and/or by toll-free telephone lines and/or via e-mail]*. Vendor's Help Desk Services shall include but are not limited to the following Services:
  - a) Assistance related to questions on the use of the subject Software;
  - b) Assistance in identifying and determining the causes of suspected errors or malfunctions in the Software;
  - c) Advice on detours or workarounds for identified errors or malfunctions, where reasonably available;

- d) Information on errors previously identified by WSDOT and reported to Vendor and detours to these where available; and
  - e) Advice on the completion and authorization for submission of the required form(s) reporting identified problems in the Software to Vendor.
- 27.2. On-line Support. Vendor may execute on-line diagnostics from a remote Vendor location solely to assist in the identification and isolation of suspected Software errors or malfunctions.

*[For the Error and Malfunction Service below, build escalation procedures with different response times and requirements depending upon the severity of specific types of problems.]*

- 27.3. Error and Malfunction Service. Within two (2) Business Days of receiving oral or written notification by WSDOT of identified errors or malfunctions in the Software, Vendor will either:
- a) Provide WSDOT with detour or code correction to the Software error or malfunctions. Each detour or code correction will be made available in the form of either a written correction notice or machine-readable media and will be accompanied by a level of documentation adequate to inform WSDOT of the problem resolved and any significant operational differences resulting from the correction that is known by Vendor, or
  - b) Provide WSDOT with a written response describing Vendor's then-existing diagnosis of the error or malfunction and generally outlining Vendor's then-existing plan and timetable, subject to WSDOT's approval, for correcting or working around the error or malfunction.
- 27.4. On-Call Support. If a problem occurs that significantly impacts WSDOT's usage of the Software and remains unidentified or unresolved after WSDOT has utilized the detour or code correction prescribed by Vendor pursuant to subsection 27.1 or 27.3 above, Vendor will dispatch a qualified representative to the system location during Business Days and Hours. The representative must arrive within *[ \_\_\_\_\_ ( ) ]* Business Hours. This representative shall have the qualifications necessary to provide:
- a) Advice and assistance in diagnosis and identification of Software errors or malfunctions.
  - b) On-site consultation on correction or detour of identified errors or malfunctions.
- 27.5. When Vendor performs Services pursuant to this Contract that require the use of WSDOT's equipment, WSDOT agrees to make the equipment available at reasonable times and in reasonable time increments, and in no event will WSDOT charge Vendor for such use.
- 27.6. Maintenance Release Services. Vendor will provide error corrections and maintenance releases to the Software that have been developed by Vendor at no additional cost to WSDOT. Such releases shall be licensed to WSDOT pursuant to the terms and conditions of this Contract. Each maintenance release will consist of a set of programs and files made available in the form of machine-readable media and will be accompanied by a level of documentation adequate to inform WSDOT of the problems resolved including any significant differences resulting from the release that are known by Vendor. Vendor agrees that each maintenance release of Software will be compatible with the then-current unaltered release of Software applicable to the computer system.

## 28. Vendor Commitments, Warranties and Representations *(required)*

**Vendor Commitments, Warranties and Representations – This section ensures that Vendor’s written commitments that are within the scope of this Contract are binding upon Vendor.**

*[If there are specific Vendor documents to be incorporated, list them in the section titled **Section Headings, Incorporated Documents and Order of Precedence.**]*

Any written commitment by Vendor within the scope of this Contract shall be binding upon Vendor. Failure of Vendor to fulfill such a commitment may constitute breach and shall render Vendor liable for damages under the terms of this Contract. For purposes of this section, a commitment by Vendor includes: (i) Prices, discounts, and options committed to remain in force over a specified period of time; and (ii) any warranty or representation made by Vendor in its Response or contained in any Vendor or manufacturer publications, written materials, schedules, charts, diagrams, tables, descriptions, other written representations, and any other communication medium accompanying or referred to in its Response or used to effect the sale to WSDOT.

## 29. Training

*[If WSDOT requires Vendor to provide training to WSDOT’s employees, such requirement should appear in the RFX. Vendor will therefore have described its particular training program in its response to the RFX. Ensure that any training offered or promised and accepted is included in the Contract, either as a separate section or attached in a Schedule.]*

*[If WSDOT is acquiring the Software via an RFX that clearly delineates the training requirements, use the following section]*

Vendor agrees to provide training as set forth in Exhibit B, in accordance with the requirements set forth in Exhibit A.

*[-OR-]*

*[If the training is not clearly delineated in the RFX or for a sole source acquisition, use the following subsections.]*

- 29.1. At the time of installation, Vendor shall provide *[ \_\_\_\_\_ ( ) ]* days of training, by at least one qualified Vendor employee to be attended by up to *[ \_\_\_\_\_ ( ) ]* of WSDOT’s employees, agents, or independent contractors, at the installation site or at such other location as the parties may agree. Such training shall, at a minimum, include orientation and familiarization training on the Software and be sufficiently thorough to instruct WSDOT’s staff in the use of the Software.
- 29.2. The starting date of the training will be as agreed by the parties, but in no case later than *[day, month, year]*.
- 29.3. WSDOT shall have the right, so long as the Software licensed or purchased hereunder is in use by WSDOT, to give instruction to WSDOT’s personnel in all courses described above without charge, using materials supplied by Vendor. Such use by WSDOT of Vendor’s materials shall include the right to reproduce the same solely for the permitted use, which use and reproduction shall not be a violation or infringement upon any patent, copyright, or other proprietary right of Vendor. Vendor grants to WSDOT the right to

make derivative works, update, modify, copy, or otherwise reproduce the documentation furnished pursuant to this section at no additional charge.

### 30. Minority and Women's Business Enterprise (MWBE) Participation

*[Include this section only when Vendor indicated minority or women's business enterprise participation in its Response and Schedule C – MWBE Certification is attached. If this section is not used, delete subsection 7.4 above and Schedule C.]*

With each invoice for payment and within thirty (30) days of WSDOT Contract Administrator's request, Vendor shall provide WSDOT an *Affidavit of Amounts Paid*. The *Affidavit of Amounts Paid* shall either state that Vendor still maintains its MWBE certification, or state that its Subcontractor(s) still maintain(s) its/their MWBE certification(s) and specify the amounts paid to each certified MWBE Subcontractor under this Contract. Vendor shall maintain records supporting the *Affidavit of Amounts Paid* in accordance with this Contract's **Review of Vendor's Records** section.

### 31. Protection of WSDOT's Confidential Information *(required)*

**Safeguarding of Information – This section prohibits Vendor's use or disclosure of any information concerning WSDOT for any purpose not directly connected with performance of the Contract.**

*[If WSDOT has a unique category of Confidential Information—e.g., criminal records, health histories—include those in the list below.]*

- 31.1. Vendor acknowledges that some of the material and information that may come into its possession or knowledge in connection with this Contract or its performance may consist of information that is exempt from disclosure to the public or other unauthorized persons under either chapter 42.17 RCW or other state or federal statutes ("Confidential Information"). Confidential Information includes, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card information, driver's license numbers, medical data, law enforcement records, agency source code or object code, agency security data, or *[add other items as necessary or delete items not applicable]*, or information identifiable to an individual that relates to any of these types of information. Vendor agrees to hold Confidential Information in strictest confidence and not to make use of Confidential Information for any purpose other than the performance of this Contract, to release it only to authorized employees or Subcontractors requiring such information for the purposes of carrying out this Contract, and not to release, divulge, publish, transfer, sell, disclose, or otherwise make the information known to any other party without WSDOT's express written consent or as provided by law. Vendor agrees to release such information or material only to employees or Subcontractors who have signed a nondisclosure agreement, the terms of which have been previously approved by WSDOT. Vendor agrees to implement physical, electronic, and managerial safeguards to prevent unauthorized access to Confidential Information.
- 31.2. Immediately upon expiration or termination of this Contract, Vendor shall, at WSDOT's option: (i) certify to WSDOT that Vendor has destroyed all Confidential Information; or (ii) return all Confidential Information to WSDOT; or (iii) take whatever other steps WSDOT requires of Vendor to protect WSDOT's Confidential Information.

*[Executive Order 00-03 requires agencies to establish reasonable procedures to review, monitor, audit, or investigate the use of personal information (included in the definition of Confidential Information) by vendors and subcontractors and provide for these procedures in contracts. The following subsection is one method. If not reasonable for this Contract, insert an alternative method for compliance.]*

- 31.3. Vendor shall maintain a log documenting the following: the Confidential Information received in the performance of this Contract; the purpose(s) for which the Confidential Information was received; who received, maintained and used the Confidential Information; and the final disposition of the Confidential Information. Vendor's records shall be subject to inspection, review or audit in accordance with **Review of Vendor's Records**.
- 31.4. WSDOT reserves the right to monitor, audit, or investigate the use of Confidential Information collected, used, or acquired by Vendor through this Contract. The monitoring, auditing, or investigating may include, but is not limited to, salting databases.
- 31.5. Violation of this section by Vendor or its Subcontractors may result in termination of this Contract and demand for return of all Confidential Information, monetary damages, or penalties.

## Contract Administration

### 32. Legal Notices

- 32.1. Any notice or demand or other communication required or permitted to be given under this Contract or applicable law shall be effective only if it is in writing and signed by the applicable party, properly addressed, and either delivered in person, or by a recognized courier service, or deposited with the United States Postal Service as first-class mail, postage prepaid *[certified mail, return receipt requested, via facsimile or by electronic mail]*, to the parties at the addresses *[and fax number, e-mail addresses]* provided in this section. For purposes of complying with any provision in this Contract or applicable law that requires a "writing," such communication, when digitally signed with a Washington State Licensed Certificate, shall be considered to be "in writing" or "written" to an extent no less than if it were in paper form.

**To Vendor at:**

*[Vendor]*

**Attn:**

*[Vendor address]*

Phone:

Fax:

E-mail:

**To WSDOT at:**

State of Washington

*[WSDOT]*

**Attn:** *[WSDOT Contract Administrator]*

*[WSDOT address]*

Phone:

Fax:

E-mail:

- 32.2. Notices shall be effective upon receipt or four (4) Business Days after mailing, whichever is earlier. The notice address as provided herein may be changed by written notice given as provided above.

- 32.3. In the event that a subpoena or other legal process commenced by a third party in any way concerning the Software or Services provided pursuant to this Contract is served upon Vendor or WSDOT, such party agrees to notify the other party in the most expeditious fashion possible following receipt of such subpoena or other legal process. Vendor and WSDOT further agree to cooperate with the other party in any lawful effort by the other party to contest the legal validity of such subpoena or other legal process commenced by a third party.

### 33. Vendor Account Manager

Vendor shall appoint an Account Manager for WSDOT's account under this Contract who will provide oversight of Vendor activities conducted hereunder. Vendor's Account Manager will be the principal point of contact for WSDOT concerning Vendor's performance under this Contract. Vendor shall notify WSDOT Contract Administrator and WSDOT *[Project or Business]* Manager, in writing, when there is a new Vendor Account Manager assigned to this Contract. The Vendor Account Manager information is:

Vendor Account Manager:

Address:

Phone:

Fax:

E-mail:

### 34. WSDOT *[Project or Business]* Manager

WSDOT shall appoint *[name]* who will be the WSDOT *[Project or Business]* Manager for this Contract and will provide oversight of the activities conducted hereunder. WSDOT *[Project or Business]* Manager will be the principal contact for Vendor concerning business activities under this Contract. WSDOT shall notify Vendor, in writing, when there is a new WSDOT *[Project or Business]* Manager assigned to this Contract.

### 35. Section Headings, Incorporated Documents and Order of Precedence *(required)*

#### Section Headings, Incorporated Documents and Order of Precedence

**Incorporated Documents** – This section lists all documents that are part of the Contract and therefore binding on Vendor and WSDOT. Any documents not listed may not be enforceable against the parties. When information to be incorporated is expressed through a transitory or dynamic medium (e.g., videotape or information from a web site), WSDOT needs to ensure that a copy of the medium as of the Effective Date of the Contract is retained (e.g., videotape of materials, printed copy of web pages, etc.)

**Order of Precedence** – This section provides the priority of the Contract documents in the event of inconsistency among those documents. The standard order of precedence provides that federal and state law prevail; then the Contract; then, depending on the circumstances, documents related to the acquisition, such as the RFX, the Vendor's Response, etc.

- 35.1. The headings used herein are inserted for convenience only and shall not control or affect the meaning or construction of any of the sections.
- 35.2. Each of the documents listed below is, by this reference, incorporated into this Contract as though fully set forth herein.
- a) Schedules A, B and C *[if applicable]*; *[include other Schedules, if appropriate]*

- b) *[WSDOT] [RFX]* dated *[date]*;
- c) Vendor's Response to *[WSDOT] [RFX]* dated *[date]*;
- d) The terms and conditions contained on WSDOT's purchase documents, if used; and
- e) All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, other written representations and any other supporting materials Vendor made available to WSDOT and used to effect the sale of Software to WSDOT.

35.3. In the event of any inconsistency in this Contract, the inconsistency shall be resolved in the following order of precedence:

- a) Applicable federal and state statutes, laws, and regulations;
- b) Sections of this Contract;
- c) Schedule A; *[include other Schedules, if appropriate]*
- d) *[WSDOT] [RFX]* dated *[date]*;
- e) Vendor's Response to *[WSDOT] [RFX]* dated *[date]*;
- f) The terms and conditions contained on WSDOT's order documents, if used; and
- g) All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, other written representations and any other supporting materials Vendor made available to WSDOT and used to effect the sale of Software to WSDOT.

### 36. Entire Agreement *(required)*

**Entire Agreement – This section establishes that the Contract constitutes the entire agreement between WSDOT and Vendor with respect to the subject matter of the Contract and supersedes all previous discussions, bid processes, and agreements, except as provided in the section titled Vendor Commitments, Warranties, and Representations. Important performance specifications, communications regarding goods and Services to be provided, Vendor assurances, etc., that are not already written into the Contract or attached as a schedule should be included in the list of incorporated documents in the section titled Section Headings, Incorporated Documents and Order of Precedence.**

This Contract sets forth the entire agreement between the parties with respect to the subject matter hereof and except as provided in the section titled **Vendor Commitments, Warranties and Representations**, understandings, agreements, representations, or warranties not contained in this Contract or a written amendment hereto shall not be binding on either party. Except as provided herein, no alteration of any of the terms, conditions, delivery, Price, quality, or Specifications of this Contract will be effective without the written consent of both parties.

### 37. Authority for Modifications and Amendments

No modification, amendment, alteration, addition, or waiver of any section or condition of this Contract shall be effective or binding unless it is in writing and signed by WSDOT and Vendor Contracting Officers. Only WSDOT Contracting Officer shall have the express, implied, or apparent authority to alter, amend, modify, add, or waive any section or condition of this Contract on behalf of WSDOT.

**38. Independent Status of Vendor *(required)***

**Independent Status of Vendor – This section makes clear that Vendor is an independent contractor and neither Vendor nor Vendor’s employees are WSDOT’s employees. Because Vendor is an independent contractor, WSDOT is not required to pay employee taxes such as worker’s compensation, FICA, and unemployment compensation.**

In the performance of this Contract, the parties will be acting in their individual, corporate or governmental capacities and not as agents, employees, partners, joint venturers, or associates of one another. The parties intend that an independent contractor relationship will be created by this Contract. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever. Vendor shall not make any claim of right, privilege or benefit which would accrue to an employee under chapter 41.06 RCW or Title 51 RCW.

**39. Governing Law *(required)***

**Governing Law – Washington State law shall govern the Contract. Since commercial law varies from state to state, it is important to include the governing law, particularly when dealing with out-of-state vendors.**

**Venue – The venue is the locality where a trial occurs. Any lawsuit involving the Contract would be filed in the county stated in this clause. For agencies in the Olympia area, for example, this is Thurston County.**

This Contract shall be governed in all respects by the law and statutes of the state of Washington, without reference to conflict of law principles. However, if the Uniform Computer Information Transactions Act (UCITA) or any substantially similar law is enacted as part of the law of the state of Washington, said statute will not govern any aspect of this Contract or any license granted hereunder, and instead the law as it existed prior to such enactment will govern. The jurisdiction for any action hereunder shall be exclusively in the Superior Court for the state of Washington. The venue of any action hereunder shall be in the Superior Court for *[Thurston, or other appropriate county]* County, Washington.

**40. Subcontractors**

**Subcontractors – This section defines conditions under which Vendor can subcontract work. Generally, Vendor’s Response will identify the Subcontractors. When the service of a Subcontractor is required after award, and the Subcontractor was not identified in the Response, Vendor must request advance approval in writing from WSDOT for use of the selected Subcontractor.**

Vendor may, with prior written permission from WSDOT Contracting Officer, which consent shall not be unreasonably withheld, enter into subcontracts with third parties for its performance of any part of Vendor’s duties and obligations. In no event shall the existence of a subcontract operate to release or reduce the liability of Vendor to WSDOT for any breach in the performance of Vendor’s duties. For purposes of this Contract, Vendor agrees that all Subcontractors shall be held to be agents of Vendor. Vendor shall be liable for any loss or damage to WSDOT, including but not limited to personal injury, physical loss, harassment of WSDOT employee, or violations of the **Patent and Copyright Indemnification, Protection of WSDOT’s Confidential**

**Information, Ownership/Rights in Data, and Software Ownership** sections of this Contract occasioned by the acts or omissions of Vendor's Subcontractors, their agents or employees. The **Patent and Copyright Indemnification, Protection of WSDOT's Confidential Information, Ownership/Rights in Data, Software Ownership, Publicity and Review of Vendor's Records** sections of this Contract shall apply to all Subcontractors.

#### 41. Assignment

**Assignment – Assignment can occur for several reasons—for example, when one company buys another and the new company takes over responsibility for performing contractual duties. This section describes the conditions for either WSDOT or Vendor to assign this Contract. Vendor may not assign or transfer its rights, duties, or obligations without written notification to WSDOT and receipt of WSDOT's written consent. WSDOT may assign it to another entity within Washington.**

*[If Vendor performance or financial condition is a problem, it may be prudent to allow Vendor assignment "at WSDOT's sole option" rather than stating that WSDOT's consent "shall not be unreasonably withheld" in the following subsection.]*

- 41.1. With the prior written consent of WSDOT Contracting Officer, which consent shall *["not be unreasonably withheld," – OR – "be at WSDOT's sole option"]*, Vendor may assign this Contract including the proceeds hereof, provided that such assignment shall not operate to relieve Vendor of any of its duties and obligations hereunder, nor shall such assignment affect any remedies available to WSDOT that may arise from any breach of the sections of this Contract, or warranties made herein including but not limited to, rights of setoff.
- 41.2. WSDOT may assign this Contract to any public agency, commission, board, or the like, within the political boundaries of the state of Washington, provided that such assignment shall not operate to relieve WSDOT of any of its duties and obligations hereunder.

#### 42. Publicity *(required)*

**Publicity – This section establishes that Vendor will not use any advertising, sales promotion, or other publicity materials in which WSDOT's name is specifically stated, implied, or can be inferred without WSDOT's consent.**

- 42.1. The award of this Contract to Vendor is not in any way an endorsement of Vendor or Vendor's products by WSDOT and shall not be so construed by Vendor in any advertising or other publicity materials.
- 42.2. Vendor agrees to submit to WSDOT, all advertising, sales promotion, and other publicity materials relating to this Contract or any Product furnished by Vendor wherein WSDOT's name is mentioned, language is used, or Internet links are provided from which the connection of WSDOT's name therewith may, in WSDOT's judgment, be inferred or implied. Vendor further agrees not to publish or use such advertising, sales promotion materials, publicity or the like through print, voice, the World Wide Web, and other communication media in existence or hereinafter developed without the express written consent of WSDOT *prior* to such use.

*[Use of the following subsection is optional.]*

- 42.3. Either Party may use the other Party's name and logo (except for the State seal) in advertising, sales promotion, and other publicity materials relating to this Contract, without royalty, provided that this Contract and the relationship between the parties is not misrepresented.

#### 43. Review of Vendor's Records *(required)*

**Records, Documents and Reports – This section requires Vendor to maintain books, records and documents to reflect Vendor's compliance with Contract requirements and all direct and indirect costs expended in the performance of the Contract for potential audit.**

- 43.1. Vendor and its Subcontractors shall maintain books, records, documents and other evidence relating to this Contract, including but not limited to Minority and Women's Business Enterprise participation, protection and use of WSDOT's Confidential Information, and accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature invoiced in the performance of this Contract. Vendor shall retain all such records for six (6) years after the expiration or termination of this Contract. Records involving matters in litigation related to this Contract shall be kept for either one (1) year following the termination of litigation, including all appeals, or six (6) years from the date of expiration or termination of this Contract, whichever is later.
- 43.2. All such records shall be subject at reasonable times and upon prior notice to examination, inspection, copying, or audit by personnel so authorized by the WSDOT's Contract Administrator and/or the Office of the State Auditor and federal officials so authorized by law, rule, regulation or contract, when applicable, at no additional cost to the State. During this Contract's term, Vendor shall provide access to these items within *[Thurston, or other appropriate county]* County. Vendor shall be responsible for any audit exceptions or disallowed costs incurred by Vendor or any of its Subcontractors.
- 43.3. Vendor shall incorporate in its subcontracts this section's records retention and review requirements.
- 43.4. It is agreed that books, records, documents, and other evidence of accounting procedures and practices related to Vendor's cost structure, including overhead, general and administrative expenses, and profit factors shall be excluded from WSDOT's review unless the cost or any other material issue under this Contract is calculated or derived from these factors.

### General Provisions

#### 44. Patent and Copyright Indemnification *(required)*

**Patent and Copyright Indemnification – This section establishes each party's responsibility in case of a patent, copyright, or other intellectual property right infringement.**

- 44.1. Vendor, at its expense, shall defend, indemnify, and save WSDOT harmless from and against any claims against WSDOT that any Product *[and/or Work Product]* supplied hereunder, or WSDOT's use of the Product *[and/or Work Product]* within the terms of this

Contract, infringes any patent, copyright, utility model, industrial design, mask work, trade secret, trademark, or other similar proprietary right of a third party worldwide. Vendor shall pay all costs of such defense and settlement and any penalties, costs, damages and attorneys' fees awarded by a court or incurred by WSDOT provided that WSDOT:

- a) Promptly notifies Vendor in writing of the claim, but WSDOT's failure to provide timely notice shall only relieve Vendor from its indemnification obligations if and to the extent such late notice prejudiced the defense or resulted in increased expense or loss to Vendor; and
- b) Cooperates with and agrees to use its best efforts to encourage the Office of the Attorney General of Washington to grant Vendor sole control of the defense and all related settlement negotiations.

44.2. If such claim has occurred, or in Vendor's opinion is likely to occur, WSDOT agrees to permit Vendor, at its option and expense, either to procure for WSDOT the right to continue using the Product *[and/or Work Product]* or to replace or modify the same so that they become noninfringing and functionally equivalent. If use of the Product *[and/or Work Product]* is enjoined by a court and Vendor determines that none of these alternatives is reasonably available, Vendor, at its risk and expense, will take back the Product *[and/or Work Product]* and provide WSDOT a refund. *[Insert this sentence if Contract includes Work Product: "In the case of Work Product, Vendor shall refund to WSDOT the entire amount WSDOT paid to Vendor for Vendor's provision of the Work Product."]* In the case of Product, Vendor shall refund to WSDOT its depreciated value. No termination charges will be payable on such returned Product, and WSDOT will pay only those charges that were payable prior to the date of such return. Depreciated value shall be calculated on the basis of a useful life of *[four (4)]* years commencing on the date of purchase and shall be an equal amount per year over said useful life. *[To ensure the accurate useful life, consult the Washington State Administrative and Accounting Manual, Chapter 30 (Fixed Asset Policies) for Fixed Asset Commodity Class Code List and Useful Life Schedule (<http://www.ofm.wa.gov/policy/30.50.htm>).]* The depreciation for fractional parts of a year shall be prorated on the basis of three hundred sixty-five (365) days per year. In the event the Product has been installed less than one (1) year, all costs associated with the initial installation paid by WSDOT shall be refunded by Vendor.

44.3. Vendor has no liability for any claim of infringement arising solely from:

- a) Vendor's compliance with any designs, specifications or instructions of WSDOT;
- b) Modification of the Product *[and/or Work Product]* by WSDOT or a third party without the prior knowledge and approval of Vendor; or
- c) Use of the Product *[and/or Work Product]* in a way not specified by Vendor;

unless the claim arose against Vendor's Product *[and/or Work Product]* independently of any of these specified actions.

**45. Save Harmless *(required)***

**Save Harmless – This section protects WSDOT and Vendor from the other party’s negligence or omissions, per RCW 4.92.270. Vendor holds WSDOT and WSDOT’s employees harmless from claims, suits, or actions arising from Vendor’s negligence or omissions while performing its Contractual duties. Standard indemnification language and explanations are provided by the Department of Department of Enterprise Services.**

Vendor shall defend, indemnify, and save WSDOT harmless from and against any claims, including reasonable attorneys’ fees resulting from such claims, by third parties for any or all injuries to persons or damage to property of such third parties arising from intentional, willful or negligent acts or omissions of Vendor, its officers, employees, or agents, or Subcontractors, their officers, employees, or agents. Vendor’s obligation to defend, indemnify, and save WSDOT harmless shall not be eliminated or reduced by any alleged concurrent WSDOT negligence.

*[At Vendor’s insistence, and after WSDOT has evaluated risks and determined that a limited save harmless clause is acceptable, the last sentence may be replaced with the following: “Vendor shall be required to defend, indemnify, and save WSDOT harmless only to the extent claim is caused in whole or in part by Vendor’s negligent acts or omissions.”]*

**46. Insurance**

**Insurance – Businesses that provide services to the State must carry liability insurance to protect the State’s interests. Contractual insurance in a commercial general liability policy provides coverage to protect the State from risks assumed by Vendor, whether oral or written.**

**Insurance is required only when necessary for the type of purchase being made. WSDOT determines the categories to include and their minimum limits based upon the particular Contract and upon the risk to WSDOT. The amounts specified here are illustrative only. For more specific information on insurance requirements, call WSDOT Risk Office or the Office of Financial Management, Division of Risk Management, (360) 902-7311 or visit their web site at <http://www.ofm.wa.gov/rmd/forms.htm>**

- 46.1. Vendor shall, during the term of this Contract, maintain in full force and effect, the insurance described in this section. Vendor shall acquire such insurance from an insurance carrier or carriers licensed to conduct business in the state of Washington having a rating of A-, Class VII or better, in the most recently published edition of *Best’s Reports*. In the event of cancellation, non-renewal, revocation, or other termination of any insurance coverage required by this Contract, Vendor shall provide written notice of such to WSDOT within one (1) Business Day of Vendor’s receipt of such notice. Failure to buy and maintain the required insurance may, at WSDOT’s sole option, result in this Contract’s termination.
- 46.2. The minimum acceptable limits shall be as indicated below, with no deductible *[or state an acceptable deductible amount]* for each of the following categories:

- a) Commercial General Liability covering the risks of bodily injury (including death), property damage and personal injury, including coverage for contractual liability, with a limit of not less than \$1 million per occurrence/\$2 million general aggregate;
  - b) Business Automobile Liability (owned, hired, or non-owned) covering the risks of bodily injury (including death) and property damage, including coverage for contractual liability, with a limit of not less than \$1 million per accident;
  - c) Employers Liability insurance covering the risks of Vendor's employees' bodily injury by accident or disease with limits of not less than \$1 million per accident for bodily injury by accident and \$1 million per employee for bodily injury by disease;
  - d) Umbrella policy providing excess limits over the primary policies in an amount not less than \$3 million;
  - e) Professional Liability Errors and Omissions, with a deductible not to exceed \$25,000, conditioned upon subsection 46.3 below, and coverage of not less than \$1 million per occurrence/\$2 million general aggregate; and
  - f) Crime Coverage with a deductible not to exceed \$1 million, conditioned upon subsection 46.3 below, and coverage of not less than \$5 million single limit per occurrence and \$10 million in the aggregate, which shall at a minimum cover occurrences falling in the following categories: Computer Fraud; Forgery; Money and Securities; and Employee Dishonesty.
- 46.3. For Professional Liability Errors and Omissions coverage and Crime Coverage, Vendor shall: (i) continue such coverage for six (6) years beyond the expiration or termination of this Contract, naming WSDOT as an additional insured and providing WSDOT with certificates of insurance on an annual basis; (ii) within thirty (30) days of execution of this Contract provide for WSDOT's benefit an irrevocable stand-by letter of credit, or other financial assurance acceptable to WSDOT, in the amount of \$1 million, during the initial and any subsequent terms of this Contract and for six (6) years beyond the expiration or termination of this Contract to pay for any premiums to continue such claims-made policies, or available tails, whichever is appropriate, at WSDOT's sole option, in the event Vendor fails to do so. In addition, such irrevocable stand-by letter of credit shall provide for payment of any deductible on the Professional Liability Errors and Omissions policy and the Crime Coverage under the same terms and conditions of such policy as though there were no deductible. "Irrevocable stand-by letter of credit" as used in this Contract means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by WSDOT (the beneficiary) of a written demand therefor.
- 46.4. Vendor shall pay premiums on all insurance policies. Such insurance policies shall name WSDOT as an additional insured on all general liability, automobile liability, and umbrella policies. Such policies shall also reference this Contract number *[KXXX]* and shall have a condition that they not be revoked by the insurer until forty-five (45) calendar days after notice of intended revocation thereof shall have been given to WSDOT by the insurer.
- 46.5. All insurance provided by Vendor shall be primary as to any other insurance or self-insurance programs afforded to or maintained by the State and shall include a severability of interests (cross-liability) provision.
- 46.6. Vendor shall include all Subcontractors as insured under all required insurance policies, or shall furnish separate certificates of insurance and endorsements for each Subcontractor. Subcontractor(s) shall comply fully with all insurance requirements stated

herein. Failure of Subcontractor(s) to comply with insurance requirements does not limit Vendor's liability or responsibility.

- 46.7. Vendor shall furnish to WSDOT copies of certificates of all required insurance within thirty (30) calendar days of this Contract's Effective Date and copies of renewal certificates of all required insurance within thirty (30) days after the renewal date. These certificates of insurance must expressly indicate compliance with each and every insurance requirement specified in this section. Failure to provide evidence of coverage may, at WSDOT's sole option, result in this Contract's termination.
- 46.8. By requiring insurance herein, WSDOT does not represent that coverage and limits will be adequate to protect Vendor. Such coverage and limits shall not limit Vendor's liability under the indemnities and reimbursements granted to WSDOT in this Contract.

#### 47. Industrial Insurance Coverage *(required)*

**Industrial Insurance Coverage – This section requires Vendor to comply with Title 51 RCW, Washington's industrial insurance law. With few exceptions, Title 51 RCW holds WSDOT responsible for ensuring that Vendor has such coverage.**

**Agencies can verify a Vendor's compliance with Title 51 RCW by contacting Field Audit Compliance of the Department of Labor and Industries, (360) 902-4769 or (360) 902-4753 in Olympia, or e-mail at [verifystatecontracts@lni.wa.gov](mailto:verifystatecontracts@lni.wa.gov).**

*[If Vendor has operations in Washington, include this section. If Vendor has no operations in Washington, do not include this section.]*

Prior to performing work under this Contract, Vendor shall provide or purchase industrial insurance coverage for its employees, as may be required of an "employer" as defined in Title 51 RCW, and shall maintain full compliance with Title 51 RCW during the course of this Contract. WSDOT will not be responsible for payment of industrial insurance premiums or for any other claim or benefit for Vendor, or any Subcontractor or employee of Vendor, which might arise under the industrial insurance laws during the performance of duties and services under this Contract.

#### 48. Licensing Standards

**Licensing Standards – This section requires Vendor to comply with applicable federal, state, county, or municipal standards for licensing and accreditation to assure quality of service.**

**Vendor must register with the Washington State Department of Revenue prior to performing work under the Contract. Vendor will be issued a State Uniform Business Identifier (UBI) number to be used in payment of state taxes. Out-of-state vendors performing work in Washington State are required to have UBI numbers.**

Vendor shall comply with all applicable local, state, and federal licensing, accreditation and registration requirements and standards necessary in the performance of this Contract. (See, for example, chapter 19.02 RCW for state licensing requirements and definitions.)

#### 49. OSHA/WISHA

**OSHA/WISHA – This section establishes that Vendor warrants that its Products are designed to meet federal and state safety and health regulations.**

Vendor represents and warrants that its Products, when shipped, are designed and manufactured to meet then current federal and state safety and health regulations. Vendor agrees to indemnify and hold WSDOT harmless from all damages assessed against WSDOT as a result of the failure of the Products furnished under this Contract to so comply.

#### 50. Uniform Commercial Code (UCC) Applicability

**UCC Applicability – This section establishes that the Contract provisions have precedence over any conflicting provisions of the UCC, as set forth in Title 62A RCW.**

- 50.1. Except to the extent the sections of this Contract are clearly inconsistent, this Contract shall be governed by any applicable sections of the Uniform Commercial Code (UCC) as set forth in Title 62A RCW.
- 50.2. To the extent this Contract entails delivery or performance of services, such services shall be deemed “goods” within the meaning of the UCC, except when to do so would result in an absurdity.
- 50.3. In the event of any clear inconsistency or contradiction between this Contract and the UCC, the terms and conditions of this Contract take precedence and shall prevail unless otherwise provided by law.

#### 51. Antitrust Violations

Vendor and WSDOT recognize that, in actual economic practice, overcharges resulting from antitrust violations are usually borne by WSDOT. Therefore, Vendor hereby assigns to WSDOT any and all claims for such overcharges as to goods and services purchased in connection with this Contract, except as to overcharges not passed on to WSDOT resulting from antitrust violations commencing after the date of the bid, quotation, or other event establishing the Price under this Contract.

#### 52. Compliance with Civil Rights Laws *(required)*

**Compliance with Civil Rights Laws – This section requires Vendor not to discriminate against any person for reason of age, sex, race, creed, color, national origin, or disability. Noncompliance or refusal to comply with the nondiscrimination laws, regulations or policies may result in rescission, cancellation or termination of the Contract.**

During the performance of this Contract, Vendor shall comply with all federal and applicable state nondiscrimination laws, including but not limited to: Title VII of the Civil Rights Act, 42 U.S.C. §12101 *et seq.*; the Americans with Disabilities Act (ADA); and Title 49.60 RCW, Washington Law Against Discrimination. In the event of Vendor’s noncompliance or refusal to comply with any nondiscrimination law, regulation or policy, this Contract may be rescinded, canceled, or terminated in whole or in part under the **Termination for Default** sections, and Vendor may be declared ineligible for further contracts with WSDOT.

**53. Severability *(required)***

**Severability – This section provides that if any Contract term or condition is determined to be invalid, the other Contract terms and conditions are not automatically invalid.**

If any term or condition of this Contract or the application thereof is held invalid, such invalidity shall not affect other terms, conditions, or applications which can be given effect without the invalid term, condition, or application; to this end the terms and conditions of this Contract are declared severable.

**54. Waiver *(required)***

Waiver of any breach of any term or condition of this Contract shall not be deemed a waiver of any prior or subsequent breach. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written instrument signed by the parties.

**55. Treatment of Assets**

**Treatment of Assets – This section provides that title to all property furnished by WSDOT and/or purchased by Vendor as a reimbursable item under the Contract remains with WSDOT. Vendor is responsible for loss of or damage to any such property and shall surrender the property upon Contract completion.**

- 55.1. Title to all property furnished by WSDOT shall remain in WSDOT. Title to all property furnished by Vendor, for which Vendor is entitled to reimbursement, other than rental payments, under this Contract, shall pass to and vest in WSDOT pursuant to the **Ownership/Rights in Data** section. As used in this section **Treatment of Assets**, if the “property” is Vendor’s proprietary, copyrighted, patented, or trademarked works, only the applicable license, not title, is passed to and vested in WSDOT.
- 55.2. Any WSDOT property furnished to Vendor shall, unless otherwise provided herein or approved by WSDOT, be used only for the performance of this Contract.
- 55.3. Vendor shall be responsible for any loss of or damage to property of WSDOT that results from Vendor’s negligence or that results from Vendor’s failure to maintain and administer that property in accordance with sound management practices.
- 55.4. Upon loss or destruction of, or damage to any WSDOT property, Vendor shall notify WSDOT thereof and shall take all reasonable steps to protect that property from further damage.
- 55.5. Vendor shall surrender to WSDOT all WSDOT property prior to completion, termination, or cancellation of this Contract.
- 55.6. All reference to Vendor under this section shall also include Vendor’s employees, agents, or Subcontractors.

## 56. Vendor's Proprietary Information *(required)*

**Vendor's Proprietary Information** – This section sets forth WSDOT's obligation to protect Vendor's rights and interests in Vendor's Proprietary Information to the extent consistent with law. It is Vendor's responsibility to identify Vendor's Proprietary Information. WSDOT is obligated to take reasonable steps not to inadvertently or intentionally disclose Vendor's Proprietary Information; however, WSDOT may be required to disclose such information pursuant to a public records request. Vendor may claim Proprietary rights in various forms of information that it provides to WSDOT in performance of the Contract, such as software, data, technical information, etc., but ultimately a court – *not* WSDOT and *not* Vendor – will determine whether Vendor's Proprietary Information is protected from public disclosure pursuant to chapter 42.17 RCW or other applicable laws.

Vendor acknowledges that WSDOT is subject to chapter 42.17 RCW and that this Contract shall be a public record as defined in chapter 42.17 RCW. Any specific information that is claimed by Vendor to be Proprietary Information must be clearly identified as such by Vendor. To the extent consistent with chapter 42.17 RCW, WSDOT shall maintain the confidentiality of all such information marked Proprietary Information. If a public disclosure request is made to view Vendor's Proprietary Information, WSDOT will notify Vendor of the request and of the date that such records will be released to the requester unless Vendor obtains a court order from a court of competent jurisdiction enjoining that disclosure. If Vendor fails to obtain the court order enjoining disclosure, WSDOT will release the requested information on the date specified.

## Disputes and Remedies

### 57. Disputes *(required)*

**Disputes** – When a bona fide dispute arises between WSDOT and Vendor, remedy is provided via this dispute process, which will generally precede any court action.

*[If this is a simple contract for \$10,000 or less, only the following section need be included.]*

In the event a dispute arises under this Contract, it shall be handled by a Dispute Resolution Panel in the following manner. Each party to this Contract shall appoint one member to the Panel. These two appointed members shall jointly appoint an additional member. The Dispute Resolution Panel shall review the facts, Contract terms and applicable statutes and rules and make a determination of the dispute as quickly as reasonably possible. The determination of the Dispute Resolution Panel shall be final and binding on the parties hereto. WSDOT and Vendor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Contract that are not affected by the dispute.

*[If this is a complex contract or is for more than \$10,000, use the following subsections.]*

- 57.1. In the event a bona fide dispute concerning a question of fact arises between WSDOT and Vendor and it cannot be resolved between the parties, either party may initiate the dispute resolution procedure provided herein.
- 57.2. The initiating party shall reduce its description of the dispute to writing and deliver it to the responding party. The responding party shall respond in writing within three (3) Business Days. The initiating party shall have three (3) Business Days to review the

response. If after this review resolution cannot be reached, both parties shall have three (3) Business Days to negotiate in good faith to resolve the dispute.

- a) If the dispute cannot be resolved after three (3) Business Days, a Dispute Resolution Panel may be requested in writing by either party who shall also identify the first panel member. Within three (3) Business Days of receipt of the request, the other party will designate a panel member. Those two panel members will appoint a third individual to the dispute resolution panel within the next three (3) Business Days.
- b) The Dispute Resolution Panel will review the written descriptions of the dispute, gather additional information as needed, and render a decision on the dispute in the shortest practical time.
- c) Each party shall bear the cost for its panel member and share equally the cost of the third panel member.

*[Include the following subsection whenever possible so that arbitration will be binding upon the parties.]*

57.3. Both parties agree to be bound by the determination of the Dispute Resolution Panel.

57.4. Both parties agree to exercise good faith in dispute resolution and to settle disputes prior to using a Dispute Resolution Panel whenever possible. *[If the previous subsection on the decision of the Dispute Resolution Panel being binding is omitted from the Contract, add: "Unless irreparable harm will result, neither party shall commence litigation against the other before the Dispute Resolution Panel has issued its decision on the matter in dispute."]*

57.5. WSDOT and Vendor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Contract that are not affected by the dispute.

57.6. If the subject of the dispute is the amount due and payable by WSDOT for Services being provided by Vendor, Vendor shall continue providing Services pending resolution of the dispute provided WSDOT pays Vendor the amount WSDOT, in good faith, believes is due and payable, and places in escrow the difference between such amount and the amount Vendor, in good faith, believes is due and payable.

## **58. Attorneys' Fees and Costs**

58.1. If any litigation is brought to enforce any term, condition, or section of this Contract, or as a result of this Contract in any way, the prevailing party shall be awarded its reasonable attorneys' fees together with expenses and costs incurred with such litigation, including necessary fees, costs, and expenses for services rendered at both trial and appellate levels, as well as subsequent to judgment in obtaining execution thereof.

58.2. In the event that the parties engage in arbitration, mediation or any other alternative dispute resolution forum to resolve a dispute in lieu of litigation, both parties shall share equally in the cost of the alternative dispute resolution method, including cost of mediator or arbitrator. In addition, each party shall be responsible for its own attorneys' fees incurred as a result of the alternative dispute resolution method.

## **59. Non-Exclusive Remedies**

The remedies provided for in this Contract shall not be exclusive but are in addition to all other remedies available under law.

## 60. Liquidated Damages

**Liquidated Damages – This section establishes the amount of damages upon the breach of certain contractual requirements. If the timeline for the performance of any contractual requirement is critical to WSDOT, then this section may be used. The amount is determined through a good faith effort to estimate damages should a breach occur, when the actual damages amount is not reasonably ascertainable.**

*[If this section is not used, strike references to it in other sections by searching for the term “Liquidated Damages.”]*

### 60.1. Liquidated Damages – General

- a) Any delay by Vendor in meeting the *[Delivery Date, Installation Date, maintenance or repair date, or other applicable date]* set forth in this Contract will interfere with the proper implementation of WSDOT’s programs and will result in loss and damage to WSDOT.
- b) As it would be impracticable to fix the actual damage sustained in the event of any such failure(s) to perform, WSDOT and Vendor agree that in the event of any such failure(s) to perform, the amount of damage which will be sustained will be the amount set forth in the following subsections and the parties agree that Vendor shall pay such amounts as liquidated damages and not as a penalty.
- c) Liquidated damages provided under the terms of this Contract are subject to the same limitations as provided in the section titled **Limitation of Liability**.

### 60.2. Liquidated Damages – Specific

- a) If Vendor does not have the Software *[delivered by the Delivery Date or installed by the Installation Date, whichever is applicable]* agreed upon between WSDOT and Vendor, then Vendor shall provide a revised *[Delivery Date or Installation Date, whichever is applicable]* and pay to WSDOT as fixed and agreed liquidated damages, in lieu of all other damages due to such delay, for each calendar day between the specified *[Delivery Date or Installation Date]* and the date that Vendor actually *[delivers or installs]* the Software an amount of *[fixed dollar amount per day or percentage of total cost (purchase price plus applicable tax and shipping) of the delinquent Software per day]*.
- b) If the revised *[Delivery Date or Installation Date, whichever is applicable]* is more than *[\_\_\_\_\_] (\_\_\_)* calendar days from the original *[Delivery Date or Installation Date, whichever is applicable]*, then by written notice to Vendor, WSDOT may immediately terminate the right of Vendor to *[deliver or install]* the Software and WSDOT may obtain substitute Software from another vendor. In this event, Vendor shall be liable for fixed and agreed-upon liquidated damages, in lieu of all other damages due to such delay, in the amount specified above, until substitute Software is *[delivered or installed]*, or a maximum of *[\_\_\_\_\_] (\_\_\_)* *[length of time appropriate for this acquisition]* calendar days from the original *[Delivery Date or Installation Date]*, whichever occurs first.

*[Use the following subsection for a guaranteed response time for maintenance.]*

- c) If Vendor’s maintenance personnel fail to arrive at WSDOT’s site within *[insert agreed upon time period]* after notification by WSDOT that maintenance is required, Vendor shall pay to WSDOT as fixed and agreed liquidated damages, in lieu of all

other damages due to such non-responsiveness, for each hour between the agreed *[insert agreed upon time period]* response time and the actual response time an amount of *[\_\_\_\_\_]* dollars *[( \$\_\_\_\_ )]* per hour for each “late” hour or part thereof (prorated) beginning with the time of notification by WSDOT and ending with the time that Vendor’s maintenance personnel arrive at WSDOT’s site.

## 61. Failure to Perform

**Failure to Perform – This section establishes that WSDOT may withhold monies after written notification that Vendor has failed to perform any substantial Contract obligation.**

If Vendor fails to perform any substantial obligation under this Contract, WSDOT shall give Vendor written notice of such Failure to Perform. If after *[thirty (30)]* calendar days *[or other appropriate time period]* from the date of the written notice Vendor still has not performed, then WSDOT may withhold all monies due and payable to Vendor, without penalty to WSDOT, until such Failure to Perform is cured or otherwise resolved.

## 62. Limitation of Liability *(required)*

- 62.1. The parties agree that neither Vendor nor WSDOT shall be liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages except a claim related to bodily injury or death, or a claim or demand based on a Data Warranty or No Surreptitious Code Warranty issue or patent, copyright, or other intellectual property right infringement, in which case liability shall be as set forth elsewhere in this Contract. This section does not modify any sections regarding liquidated damages or any other conditions as are elsewhere agreed to herein between the parties. The damages specified in the sections titled **OSHA/WISHA, Termination for Default, and Review of Vendor’s Records** are not consequential, incidental, indirect, or special damages as that term is used in this section.
- 62.2. Neither Vendor nor WSDOT shall be liable for damages arising from causes beyond the reasonable control and without the fault or negligence of either Vendor or WSDOT. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of a governmental body other than WSDOT acting in either its sovereign or contractual capacity, war, explosions, fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the delays must be beyond the reasonable control and without fault or negligence of Vendor, WSDOT, or their respective Subcontractors.
- 62.3. If delays are caused by a Subcontractor without its fault or negligence, Vendor shall not be liable for damages for such delays, unless the Services to be performed were obtainable on comparable terms from other sources in sufficient time to permit Vendor to meet its required performance schedule.
- 62.4. Neither party shall be liable for personal injury to the other party or damage to the other party’s property except personal injury or damage to property proximately caused by such party’s respective fault or negligence.

## Contract Termination

### 63. Termination for Default *(required)*

**Termination for Default – This section allows termination of the Contract due to documented deficiencies in Vendor’s or WSDOT’s performance.**

- 63.1. If either WSDOT or Vendor violates any material term or condition of this Contract or fails to fulfill in a timely and proper manner its obligations under this Contract, then the aggrieved party shall give the other party written notice of such failure or violation. The responsible party will correct the violation or failure within *[thirty (30) calendar days or other appropriate time period]* or as otherwise mutually agreed in writing. If the failure or violation is not corrected, this Contract may be terminated immediately by written notice from the aggrieved party to the other party. The option to terminate shall be at the sole discretion of the aggrieved party. WSDOT reserves the right to suspend all or part of the Contract, withhold further payments, or prohibit Vendor from incurring additional obligations of funds during investigation of any alleged Vendor compliance breach and pending corrective action by Vendor or a decision by WSDOT to terminate the Contract.
- 63.2. In the event of termination of this Contract by WSDOT, WSDOT shall have the right to procure the Products and Services that are the subject of this Contract on the open market and Vendor shall be liable for all damages, including, but not limited to: (i) the cost difference between the original Contract price for the Products and Services and the replacement costs of such Products and Services acquired from another Vendor; (ii) if applicable, all administrative costs directly related to the replacement of this Contract, such as costs of competitive bidding, mailing, advertising, applicable fees, charges or penalties, staff time costs; and, (iii) any other costs to WSDOT resulting from Vendor’s breach. WSDOT shall have the right to deduct from any monies due to Vendor, or that thereafter become due, an amount for damages that Vendor will owe WSDOT for Vendor’s default.
- 63.3. If the Failure to Perform is without the defaulting party’s control, fault, or negligence, the termination shall be deemed to be a **Termination for Convenience**.
- 63.4. This section shall not apply to any failure(s) to perform that results from the willful or negligent acts or omissions of the aggrieved party.

### 64. Termination for Convenience *(required)*

**Termination for Convenience – This section allows the Contract to be terminated when it is in WSDOT’s best interest.**

When, at the sole discretion of WSDOT, it is in the best interest of the State, WSDOT Contracting Officer may terminate this Contract, in whole or in part, by *[fourteen (14) calendar days or other appropriate time period]* written notice to Vendor. If this Contract is so terminated, WSDOT is liable only for payments required by the terms of this Contract for Software and Services received and Accepted by WSDOT prior to the effective date of termination.

## 65. Termination for Withdrawal of Authority

In the event that WSDOT's authority to perform any of its duties is withdrawn, reduced, or limited in any way after the commencement of this Contract and prior to normal completion, WSDOT may terminate this Contract by *[seven (7) calendar days or other appropriate time period]* written notice to Vendor. No penalty shall accrue to WSDOT in the event this section shall be exercised. This section shall not be construed to permit WSDOT to terminate this Contract in order to acquire similar Services from a third party.

## 66. Termination for Non-Allocation of Funds

*[If no periodic future payments are required under the Contract, this clause may be omitted.]*

If funds are not allocated to WSDOT to continue this Contract in any future period, WSDOT may terminate this Contract by *[seven (7) calendar days or other appropriate time period]* written notice to Vendor or work with Vendor to arrive at a mutually acceptable resolution of the situation. WSDOT will not be obligated to pay any further charges for Services including the net remainder of agreed to consecutive periodic payments remaining unpaid beyond the end of the then-current period. WSDOT agrees to notify Vendor in writing of such non-allocation at the earliest possible time. No penalty shall accrue to WSDOT in the event this section shall be exercised. This section shall not be construed to permit WSDOT to terminate this Contract in order to acquire similar Services from a third party.

## 67. Termination for Conflict of Interest

**Termination for Conflict of Interest – This section provides that WSDOT may, by written notice, terminate this Contract if WSDOT finds that any gratuity, bribe, gift, or extra payment in any form has been offered or given by Vendor with the intent to secure the Contract or receive favorable treatment with regard to any aspect of the Contract.**

WSDOT may terminate this Contract by written notice to Vendor if WSDOT determines, after due notice and examination, that any party has violated chapter 42.52 RCW, Ethics in Public Service or any other laws regarding ethics in public acquisitions and procurement and performance of contracts. In the event this Contract is so terminated, WSDOT shall be entitled to pursue the same remedies against Vendor as it could pursue in the event Vendor breaches this Contract.

## 68. Termination Procedure

**Termination Procedure – This section provides that if WSDOT terminates the Contract, Vendor is required to deliver to WSDOT any property produced to the point of termination as part of the Contract performance. The steps Vendor must follow once a notice of termination is received shall be delineated in WSDOT's Notice of Termination.**

- 68.1. In addition to the procedures set forth below, if WSDOT terminates this Contract, Vendor shall follow any procedures WSDOT specifies in WSDOT's Notice of Termination.
- 68.2. Upon termination of this Contract, WSDOT, in addition to any other rights provided in this Contract, may require Vendor to deliver to WSDOT any property, Products, or Work Products specifically produced or acquired for the performance of such part of this

Contract as has been terminated. The section titled **Treatment of Assets** shall apply in such property transfer.

- 68.3. Unless otherwise provided herein, WSDOT shall pay to Vendor the agreed-upon price, if separately stated, for the Products or Services received and Accepted by WSDOT, provided that in no event shall WSDOT pay to Vendor an amount greater than Vendor would have been entitled to if this Contract had not been terminated. Failure to agree with such determination shall be a dispute within the meaning of the **Disputes** section of this Contract. WSDOT may withhold from any amounts due Vendor such sum as WSDOT determines to be necessary to protect WSDOT from potential loss or liability.
- 68.4. Vendor shall pay amounts due WSDOT as the result of termination within thirty (30) calendar days of notice of amounts due. If Vendor fails to make timely payment, WSDOT may charge interest on the amounts due at one percent (1%) per month until paid in full.

## 69. Covenant Against Contingent Fees

**Covenant Against Contingent Fees – This section requires Vendor to warrant that no person or selling agent has been employed or retained to solicit or secure the Contract. A firm cannot hire an individual to use “influence” to obtain a contract.**

*[Include this section when federal funds are used for the purchase or in other special circumstances.]*

- 69.1. Vendor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon any agreement or understanding for a commission, percentage, brokerage, or contingent fee, *except* bona fide employees or a bona fide established commercial or selling agency of Vendor.
- 69.2. In the event Vendor breaches this section, WSDOT shall have the right to either annul this Contract without liability to WSDOT, or, in WSDOT’s discretion, deduct from payments due to Vendor, or otherwise recover from Vendor, the full amount of such commission, percentage, brokerage, or contingent fee.

## Contract Execution

### 70. Authority to Bind

The signatories to this Contract represent that they have the authority to bind their respective organizations to this Contract.

## 71. Counterparts

**Counterparts – This section provides for counterparts or duplicate originals of the Contract. Each party may sign a separate signature page, each of which will be made a part of the Contract and be considered an original.**

This Contract may be executed in counterparts or in duplicate originals. Each counterpart or each duplicate shall be deemed an original copy of this Contract signed by each party, for all purposes.

**Signature Blocks – This section provides a statement of understanding of and agreement to the Contract, followed by signature blocks.**

*[Do not have the signature block appear on a page by itself. Include a portion of the Contract text at the top of the page.]*

*Only those persons with authority to bind the parties may sign the Contract. This ensures that Vendor has approved the full Contract, and WSDOT can respond with its approval signature.*

*Upon execution, signed copies of the Contract should be provided to all interested parties including, but not limited to, Vendor Contracting Officer, WSDOT [Project or Business] Manager, and WSDOT Contracting Officer. In most instances, Contract performance may begin immediately or may be scheduled for a predetermined date.]*

**In Witness Whereof**, the parties hereto, having read this Contract in its entirety, including all attachments, do agree in each and every particular and have thus set their hands hereunto.

*[Add Effective Date below.]*

**This Contract is effective this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.**

**Approved**  
State of Washington  
*[WSDOT]*

**Approved**  
*[Vendor]*

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print or Type Name

\_\_\_\_\_  
Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

**Each WSDOT that is a state agency is required to have its contract approved as to form by the Attorney General's Office (AGO). Approval as to form by the AGO verifies the contract instrument's legality but does not imply concurrence with or approval of the content.**

**Approved as to Form**

State of Washington  
Office of the Attorney General

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name

Assistant Attorney General

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**Vendor Information**

Vendor's UBI Number:

Minority or Woman Owned Business Enterprise

Yes \_\_\_\_\_ No ☐  
(Certification Number)

## **Schedule A**

### ***Authorized Product and Price List***

as of *[date]*

for  
**Contract Number *[KXXX]***  
with  
***[Vendor]***

*[Vendor]* is authorized to sell **only the Products identified in this Schedule A at the Prices set forth in this Schedule A** under this Contract.

*[List information required to be included by the Vendor, e.g., Product category, name, description, Prices, training Prices, installation Prices, upgrade Prices, maintenance Prices, etc.]*

## **Schedule B**

### ***ESCROW AGREEMENT***

## **Schedule C**

### ***MWBE Certification***